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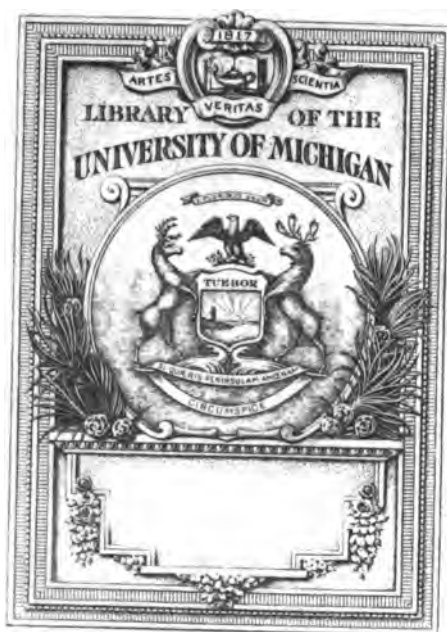
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New York (State)

DEPARTMENT REPORTS

OF THE

STATE OF NEW YORK

CONTAINING THE

DECISIONS, OPINIONS AND RULINGS

OF THE

State Officers, Departments, Boards
and Commissions

AND

MESSAGES OF THE GOVERNOR

OFFICIAL EDITION

WILLIAM V. R. ERVING, Miscellaneous Reporter

VOLUME 17

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1918

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STATE OFFICIALS

Corrected to date

(Address, Albany, N. Y., except where otherwise indicated)

1918

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COURT OF CLAIMS

HENRY P. BURGARD, Claimant, v. STATE OF NEW YORK,
Defendant

Claim No. 14696

(Filed August 1, 1918)

What constitutes the law of the State in regard to the Barge canal construction.

Outline of the subject matter and the circumstances of the contract involved herein.

The dam which was washed away and the duty of the State and of the contractor in respect thereto.

The judgment of State officials may be such as to amount to legal negligence and result in damages being found against the State.

Chapter 147 of the Laws of 1903, providing for the construction of the present Barge canal and for a branch thereof from Lake Ontario at the city of Oswego through the Oswego river to the main canal, having been submitted to the people and approved by them, the provisions of that law, as since amended, constitute the law of the State in regard to the work of constructing said Barge canal.

The State entered into a contract with the American Pipe and Construction Company for the construction of a portion of the Barge canal between the cities of Fulton and Oswego commencing at the end of contract No. 10 at Fulton and ending at the commencement of contract No. 35 at Oswego, and including the construction of locks 5 and 6, with adjoining dams, bulkheads and other structures, the removal of Battle Island and High dams and the dredging of a channel between the sites of the two contracts above mentioned, together with certain incidental work connected therewith, excepting the machinery for operating the lock gates and valves and capstans, which was to be known as contract No. 37. This contract was duly entered into on December 9, 1910, but on the 9th day of April, 1911, the said company assigned the contract in question to Henry P. Burgard who is the present claimant. The assignment having been consented to and approved by the officers of the State, the said Henry P. Burgard began the work under this contract and furnished the necessary work, labor and materials therefor and completed the same about December 1, 1915, and thereupon the completed work was accepted by a resolution of the Canal Board on February 9, 1916.

The present claim was filed on the 20th day of November, 1916, with the proper officials of the State, and an order having been made by the Court of Claims permitting the State to serve and file a counterclaim based upon the allegation that the claimant had neglected to perform his contract within the time specified and that damages should be allowed the State therefor and also alleging that the work under the contract remained uncompleted, on the 14th of March, 1918, a reply to such counterclaim was made by the claimant and duly served. The items included in this claim are items Nos. 37 to 50 inclusive, except items 39 and 50 which have been withdrawn; that none of the other items above mentioned were included in the final estimate or account, or paid for by the State.

The territory embraced in the contract was approximately the Oswego river from the city of Fulton to the city of Oswego. The river was divided into three pools; one created by the Battle Island dam which crossed the river just above the island of that name; the other by a dam constructed across the river at Minetto, and the third by a dam constructed across the river known as Old High dam, approximately halfway between Minetto and Oswego. Below that was another pool created by a dam in the city of Oswego which is below the site of contract No. 37. Under the old system at each of the dams mentioned was a lock by which boats could pass from one pool to the other. The contract called for the removal of the three dams and the locks and the erection of two new dams and the creation of two new pools to take the place of the three previously existing. One new dam was to be constructed at Minetto and the other near Oswego. The old dams were constructed by the State and became a part of its canal system and were under the jurisdiction, control and maintenance of the Superintendent of Public Works. The contract in question was to be carried on so as not to interfere with the navigation of the present canal and the contractor was allowed to place and maintain upon the existing High dam flash boards not to exceed two feet in height. The necessary dredging was also to be done so that navigation in the new channel would be uninterrupted whenever travel in the existing channel was cut off. Various other provisions were contained in the contract as to the manner in which the contractor should provide against interfering with traffic through the old canal while fulfilling his contract. In the spring of 1911 some fifty feet of the apron of Old High dam next to the west abutment washed away and shortly afterward the Superintendent of Public Works made certain repairs to the west abutment of said dam but did not make any repairs to the dam itself. The Old High dam was in an unsafe and defective condition in the fall of 1911 and such condition was known to the officers, servants and employees of the State of New York but they negligently failed to repair the same. In April, 1912, a portion of the same dam, about 136 feet in length on the west end thereof, was washed out on account of its defective and unsafe condition and while it was under the care, control and management of the officers of the State whose duties were to maintain it until the same could be removed by the claimant pursuant to the

terms of his contract. At that time the work of the claimant in the construction of the new dam at Oswego and the new dam at Minetto had not progressed far enough to enable him to remove the Old High dam and to maintain navigation in the then existing canal. The washing out of the Old High dam reduced the volume of water in the pool above that dam to such an extent as to interfere seriously with the operations of the claimant in the ordinary work under his contract, and also prevented navigation of the existing canal.

The claimant asks herein for judgment against the State for \$475,686.41. This claim is based upon numerous items which are set forth and considered at length in the opinion. The purpose of the old dam was to create pools that would feed the canal as it passed from one level to another level, thus facilitating navigation, the operation of which was under the jurisdiction and control of the Superintendent of Public Works. *Held*, that it was the duty of the Engineering Department and the said Superintendent to together construct and keep in repair the canal and its feeders, and that the State, therefore, in requiring the contractor under the contract to do his work without interfering with navigation, was bound to see that the existing canal with its feeders was maintained by it in such manner as to enable the contractor to fulfil his obligations; that the giving away of the dam with the consequent destruction of the pool created by it was caused by reason of the negligence of the State officers in failing to properly protect the existing canal and the said feeders. The referee disclaims any desire to criticize the action of the State officers and holds that they were evidently desirous to save expense to the State, and hoped that the dam would hold out until the contractor could complete the new dam and thus preserve the navigation of the canal but holds that their judgment in reference to the economizing of the expense of repairing the dam and with reference to the hope that it would hold out was erroneous and amounted to legal negligence from which the claimant suffered damages. Judgment in the amount of \$177,703.32 for claimant.

CLAIM against the State of New York arising from the negligence of State officials in failing to repair and strengthen a dam on the Oswego river, with the result that the claimant sustained damages by the washing out of said dam.

The matter of this claim was referred by the Court of Claims to Judge Albert Haight, as official referee, and after full investigation Judge Haight filed with the court his formal report as follows:

To the Honorable, the Court of Claims of the State of New York:

GENTLEMEN.—Pursuant to an order of your honorable court entered on the 19th day of June, 1917, the above entitled claim

was referred to me as official referee pursuant to chapter 229 of the Laws of 1911, to hear, try and determine the issues therein involved.

Thereupon and in compliance with the provisions of such order of reference, the parties appeared before me on the 17th day of December, 1917, at the court house in the city of Syracuse, N. Y., that being the time and place agreed upon by the parties for the trial of the issues involved; the State by Hon. Merton E. Lewis, Attorney-General, represented by William E. Thorpe, Esq., and George I. Sleicher, Esq., Deputy Attorneys-General, and the claimant in person, represented by Messrs. Costello, Burden, Cooney & Walters.

Thereupon the referee's oath prescribed by law was waived by the stipulation of all of the parties.

The trial then commenced and was continued from time to time and upon divers subsequent days by adjournment upon the request and consent of the parties at said court house in the city of Syracuse, N. Y., and at the office of the referee in the city of Buffalo, N. Y., until the close of the evidence and the conclusion of the trial on the 9th day of May, 1918, at which time the attorneys of the parties submitted oral arguments and briefs, with the privilege of thereafter submitting requests to find and reply briefs, and to forward to the office of the referee in the city of Buffalo the exhibits of the respective parties in the case, which briefs and exhibits and requests to find were finally received on the 29th day of June, 1918.

On the 6th day of May, 1918, at the request of the parties and attended by their attorneys, I visited that portion of the canal embraced in the contract on which the claims under consideration are based.

Now, therefore, after hearing William E. Thorpe, Esq., and George I. Sleicher, Esq., Deputy Attorneys-General, on behalf of the State, and Costello, Burden, Cooney & Walters, attorneys on behalf of the claimant, and due deliberation having been had, I do find and decide as follows:

FINDINGS OF FACT

I

The Legislature of the State of New York in the year 1903 enacted chapter 147 of the Laws of that year, which became effective on the seventh day of April of that year, containing provisions for the construction of a Barge canal from Lake Erie at the city of Buffalo to the Hudson river, and also from Lake Ontario at the city of Oswego through the Oswego river to the point of junction with the Lake Erie and Hudson River canal commonly known as the Barge canal. Under the provisions of that act it was required that the construction of such a canal should be first submitted to the people of the State for their approval at a general election to be held in November of that year and at said election the provisions of said chapter were approved by popular vote of the people, which provisions with the amendments that have been made thereto from time to time as printed in the Session Laws are in force as the laws of the State and may be considered a part of this report without specifically quoting the provisions herein.

II

Pursuant to the provisions of the above mentioned laws of the State of New York, it, through its duly constituted officers, on the 9th day of August, 1910, advertised for bids from contractors for the construction of a portion of the Barge canal located between the cities of Fulton and Oswego, commencing at the end of contract No. 10 at Fulton, and ending at the commencement of contract No. 35 at Oswego, which included the construction of locks 5 and 6, with adjoining dams, bulkheads and other structures, the removal of Battle Island and High dams, and the dredging of a channel between the two contracts above mentioned, together with all the work incidental thereto, as specified in the contract, plans and specifications, excepting the machinery for operating the lock gates and valves and capstans, which was to be known as contract No. 37. The advertisement provided

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that bids were to be presented to the Superintendent of Public Works of the State of New York on the 7th day of September, 1910, but upon that day no bids were submitted or presented, and consequently no contract was awarded.

III

On the 26th day of October, 1910, the State of New York, through its said constituted authorities, again advertised for proposals for the construction of such section of the Barge canal, asking for proposals for doing the aforementioned work to be submitted on the 22d day of November, 1910; that on that day two bids were received by the Superintendent of Public Works, one of which bids was by the American Pipe and Construction Company, a corporation authorized to do business in the State of New York, which was accompanied by a certified check in amount called for by the advertisement, which bid was found to be the lowest and most favorable to the State, and therefore that company became entitled to the contract.

IV

On the 9th day of December, 1910, contract No. 37 was duly made and entered into by and between the American Pipe and Construction Company and the State of New York, which contract, including the preliminary estimates of quantities and costs, the itemized proposal or bid of the contractor, with the plans and specifications and special specifications, constituting Exhibit No. 1, partially written and partially printed, is hereby made a part of this report of my findings of fact, with the same force and effect as if the provisions were specifically found herein, and will be filed with the clerk of the court as a part of this report.

V

On the 19th day of April, 1911, the American Pipe and Construction Company assigned said contract No. 37 to Henry P. Burgard, the above-named claimant, which assignment was duly consented to and approved by the duly constituted officers of the State of New York.

VI

That thereupon Henry P. Burgard, the above-named claimant, proceeded to perform the work, labor and services, and furnish the material called for under the provisions of the contract and specifications, and completed the work thereon on or about the 1st day of December, 1915; thereupon the work under the contract was accepted by a resolution of the Canal Board of the State of New York on the 9th day of February, 1916, of which the following is a copy:

"WHEREAS, the State Engineer and Surveyor and the Superintendent of Public Works have certified to the Canal Board that the work embraced in Barge Canal Contract No. 37, entered into under date of December 9, 1910, between the State of New York and Henry P. Burgard, Contractor, has been completed in a satisfactory manner;

"Resolved, that Barge Canal Contract No. 37 be and the same is hereby accepted and payment of 90% of the retained percentage pending the preparation of the final account is hereby authorized, contingent upon the Contractor filing a bond in an amount of \$6,000 to cover certain work incidental to the Contractor, providing it is determined by the State Engineer and Superintendent of Public Works that the Contractor should be held liable for the performance of such work; the payment of 90% of the retained percentage is not intended to and does not relieve or release said Contractor from liability to pay to the State the liquidated damages sustained or by the terms of said contract payable to it for failure of the said Contractor to complete the work provided for in the contract on or before the date fixed therefor by Paragraph 15 of said contract, or by the law in such cases made and provided, and such damages whether heretofore accrued or hereafter accruing shall be due and payable the same as if said payment had not been made.

"On calling the ayes and noes, the resolution was adopted by the following count: Ayes — Messrs. Schoeneck, Hugo, Wells, Woodbury, Williams and Wotherspoon, (6); Noes — none."

VII

Thereupon and on or before the 13th day of July, 1916, the State of New York, through its duly constituted authorities, made an account of the work done and material furnished by the contractor under contract No. 37, and on that date the same was approved by a resolution of the Canal Board and the payments therein referred to were made to the claimant on July 21, 1916.

VIII

On the 9th day of November, 1916, the claimant duly filed a notice of intention to file the claim herein under consideration with the Attorney-General of the State of New York and the clerk of the Court of Claims, pursuant to the statute, and on the 20th day of November, 1916, the claimant duly filed said claim with the clerk of the Court of Claims and the Superintendent of Public Works.

IX

On or about March 1, 1918, an order was made by the Court of Claims permitting the State to serve and file a counter claim in this matter, and thereupon a counter claim was filed, in which it was in substance alleged that the claimant had neglected to perform his contract within the time specified therein and did not complete his work thereunder until after the expiration of 650 days, and that under the provisions of the contract it was agreed that the damages should be \$100 per day for each day after May 1, 1914, that the work under the contract remained uncompleted, which was in no event to be considered as a penalty or otherwise than as liquidated damages.

X

On the 14th day of March, 1918, the claimant filed a reply to the above-mentioned counterclaim with the clerk of the Court of Claims, and served a duplicate original thereof upon the Attorney-General, which counterclaim and reply are hereby made a part of this report and will be filed with the clerk in connection herewith.

XI

The claim filed herein has annexed thereto a schedule of items and the items involved in this claim are items Nos. 37 to 50 inclusive, except items Nos. 39 and 50, which have been withdrawn; that none of the other items above mentioned were included in the final estimate or account, or paid for by the State. The claim has not been presented to any other tribunal or court for audit or determination, and has not been assigned or transferred by the claimant to any other person or persons.

XII

The site of the territory embraced in the contract was approximately the Oswego river from the city of Fulton to the city of Oswego. The river was divided into three pools; one created by the Battle Island dam constructed across the river a few rods above the island of that name; the other by a dam constructed across the river at Minetto, and the third by a dam constructed across the river known as Old High Dam, approximately midway between Minetto and Oswego. Below that was another pool created by a dam in the city of Oswego, which is below the site of contract No. 37. The old Oswego canal was constructed along the eastern bank of the river and at each of the dams mentioned there was a lock by which boats could pass to and from one pool to the other. The improvement provided for by the contract of the State, with the claimant, was for the removal of the three dams located upon its site, together with the then existing locks and the erection of two new dams and the creating of two new pools to take the place of the three that previously existed. One of the new dams was to be constructed at Minetto and the other near the city of Oswego. Under the provisions of the contract new bulkheads and locks were to be constructed at each of the new dams provided for and the channel of the river excavated so that it could be utilized as the new canal. The old dams were constructed by the State and the pools created thereby supplied the old canal with water through which the boats could be floated. The dams, therefore, became a part of the canal system of the State and were under the jurisdiction, control and maintenance of the Superintendent of Public Works.

XIII

Under the provisions of the contract, the contractor agreed that "the work shall be conducted so as not to interfere with the navigation of the present canal and the safety of such banks and structures as may be required for that purpose between the 15th day of May and the 15th day of November of each year during progress of the work." It was also provided, special specification 24s, that "In order to facilitate the work the contractor will be allowed, if he so desires, to place and maintain upon the existing High Dam flash boards not to exceed two feet in height. All work connected with placing, maintaining and removing such flash boards shall be paid for by him, and the placing and removing shall be subject to the direction of the State Engineer." And again, specification 2s, it is provided that the general construction at High dam and at Minetto shall proceed simultaneously. "As the dam at Minetto will cut off navigation in the existing canal there, the completion of both dams and connected work must be so timed that boats of the draft now in use on the canal can travel in the river between Minetto and High Dam as soon as the existing canal is blocked. The dredging must also be conducted so that navigation can use the new channel whenever travel in the existing channel is cut off. The channel to be dredged between the lower end of Contract 10 at Fulton and deep water in the river below must be completed sufficiently to permit boats to use it by the time the work on Contract 10 has cut off the present canal." Again it is provided that "the removal of the existing High Dam and of Battle Island Dam shall be done as the contractor may elect after June 1, 1911, but the removal of these dams must be completed by the time the new dam below each is finished. This work shall be subject to such regulations as may be necessary for the proper maintenance of navigation." Special specifications 30s, "Prior to the 15th day of May of each year the contractor shall place all banks, structures and the prism of the canal wherever they have been interfered with by his work, in proper condition for canal navigation, so that the opening of navigation on that date will not be delayed. Where the execution

of the work or any contract requires a change in or interference with the towing path of the existing canal, the contractor shall maintain the towing path in a condition satisfactory to the Superintendent of Public Works for the passage of canal animals, or shall provide tugs or tow boats and shall tow all boats which use animal traction through any portion of the canal on his contract where he has not provided a towing path satisfactory to the Superintendent of Public Works. Payments will be made for all labor and material required to maintain navigation as above specified at the contract price for maintaining navigation."

XIV

Claim No. 37

On or about August 1, 1911, James Burden, resident engineer for this section of the canal, made an examination of old High Dam and the abutments, and on August 2, 1911, made a report of the same to his superior, Edwin Styring, division engineer, Syracuse, N. Y., as follows:

"OSWEGO, August 2, 1911.

"Contract 37 — Structures: Dams.

"MR. EDWIN STYRING,

"Division Engineer,

"Syracuse, N. Y.:

"DEAR SIR.— I enclose photographs of a hole extending through the west abutment of the High Dam. You may remember that there was leakage through this abutment last spring when the water was high. Since then the hole has greatly increased in size, as shown in the photographs, the hole is much larger on the river side than on the back. The flooring between the back of front facing stones has fallen out, making a hole inside considerably larger than shows from the front. The bottom between the stones above the hole is broken and there is approximately a vertical crack about 75 feet south of the crest of the dam, about 2 inches wide at the top, which appears to extend to the bottom of the wall. The wall north of this crack has settled down towards

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the north; the dam also has a vertical crack about 17 feet east of the abutment, and is about 6 inches lower at the abutment than at this crack. The man at the Pumping Station informs me that part of the timber foundation came out from under this end of the dam last spring; one of the timbers shows projecting from under the wall in the rear view. The abutment is in very bad condition and should have prompt repair. I have no idea that this abutment could stand a flood like that of last spring. This dam was supposedly to be turned over to the contractor on June 1st, but the City of Oswego is still using the power house.

“Very truly,

“(Signed) James Burden,
“Resident Engineer.”

XV

In the spring of 1911 about fifty feet of the apron of old High dam next to the west abutment washed away and during the months of September and October, 1911, the Superintendent of Public Works of the State of New York made certain repairs to the west abutment of said dam, but did not make any repairs to the dam itself.

XVI

Old High dam was in an unsafe and defective condition in the fall of 1911, and such condition was known to the officers, servants and employees of the State of New York, and yet they negligently failed to repair the same.

XVII

On April 1, 1912, a portion of old High dam, about 136 feet in length on the west end thereof adjoining the abutment was washed out on account of its defective and unsafe condition.

XVIII

At the time that the old High dam was washed out it was under control and management of the officers of the State, whose duties were to maintain it until the same could be removed by the claimant pursuant to the terms of his contract; that at that

time the work of the claimant in the construction of the new dam at Oswego and the new dam at Minetto had not progressed far enough so that the old High dam could be removed by him and the navigation in the then existing canal maintained.

XIX

While the flow of the water in the river at the time that old High dam was washed out was heavy, it was not greater than it had been in the preceding years at about that time of the year.

XX

The washing out of old High dam reduced the volume of water in the pool above that dam to such an extent as to prevent claimant from floating a dredge and operating the same in excavating the channel in the pool above the dam; it also operated to drain the water from the canal and prevent navigation thereof.

XXI

On the 8th day of April, 1912, the Superintendent of Public Works wrote Mr. Edwin Styring, division engineer, as follows:

"OFFICE OF ASSISTANT SUPERINTENDENT PUBLIC WORKS

"STATE OF NEW YORK

"SYRACUSE, N. Y., April 8, 1912.

"Subject: High Dam in Oswego River

"MR. EDWIN STYRING,

"Division Engineer,

"Syracuse, N. Y.:

"DEAR SIR.— Will you kindly give me some data on the High Dam in the Oswego River which recently went out?

"This dam I understand was built in 1870-1873 and cost \$221,000.

"I would like to know what in your judgment it would cost to make the repairs and the length of time it would take to do the work and the earliest time at which in your opinion the work could be commenced. I suppose you will have to give me alternative figures as to what this cost and time would be,

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depending upon the condition of the bottom, as we talked this morning.

"You will oblige me very much by giving me an immediate reply.

Yours very truly,

"(Signed) D. W. PECK,

"Copy

"*Superintendent of Public Works.*"

XXII

On April 8, 1912, the division engineer, Edwin Styring, answered the former letter of the Superintendent of Public Works as follows:

"STATE OF NEW YORK, DEPARTMENT OF STATE ENGINEER
AND SURVEYOR, MIDDLE DIVISION

"SYRACUSE, April 8, 1912.

"E.S. H.

"Subject: Oswego Canal. High Dam.

"MR. D. W. PECK,

"*Supt. of Public Works,*

"Albany, N. Y.,

"DEAR SIR.—I beg to acknowledge receipt of your letter of even date wherein you ask me to give my judgment as to the cost of repairs and length of time it will take to place High Dam, which went out in part on the first of April, in a condition to permit of navigation on the Oswego Canal.

"In reply would say that owing to the type of construction of the old dam, the stone part of which rests on cribs which are not entirely founded on rock, the distance between the crest of the dam and the rock surface as far as known being not less than 37', I would regard it as useless to try and attempt to make repairs on the dam itself, but rather consider the proposition of swinging a cofferdam from the south end of the west abutment in the form of an arch around to the point of the dam which is still intact. I would build this cofferdam to at least the height of the present crest of the dam and let it take the place of the portion of dam that has gone out for the remaining season or two that it will be necessary to maintain the old High

Dam. It is possible that inside of two seasons the new dam No. 6 near Oswego, which takes the place of the present High Dam, will have been built and the present dam submerged.

"The building of a cofferdam such as I have mentioned above will be in an unknown depth of water, but I have reason to believe that in places it is 20' deep. I have made an estimate of cost on building a crib cofferdam, sheeted in the front with steel sheet piling, and from the data such as is obtainable concerning the depth and quality of the underlying material, I would say that the dam could be built inside of \$30,000.

"Regarding the length of time it would take to build such a dam; in all probability the work on it could not be commenced inside of a month owing to the continued high water in the river. After the work had started the dam could probably be built inside of six weeks. During the time that it would be necessary to wait until the high water recedes the material could be delivered on the ground.

"On the above basis of time it would be about July 1st before the cofferdam would be built and navigation in the canal possible.

"Regarding the old dam, I find on looking over the final account in the Division Office that it was built between 1870 and 1873 at a cost of \$221,000. The dam for many years back has given trouble and has had considerable repairs from time to time, and it has always leaked more or less. During the low stage of water in the summer and fall months sometimes the entire flow of the river, except what was passing through the old canal, was leaking through the dam.

"If you require something more definite in the way of cost of repairs to the dam, I would be glad to furnish it to you as soon as it is possible to get out into the river to make soundings and measurements, but as long as the water remains anywhere near its present height it will be impracticable to put a boat out in the stream anywhere near the break.

"Very truly yours,

"(Signed) EDWIN STYRING,
Division Engineer."

"(Copy)

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XXIII

On May 6, 1912, the Superintendent of Public Works again wrote to Mr. Styring, the division engineer, as follows:

"STATE OF NEW YORK, SUPERINTENDENT OF PUBLIC WORKS

"ALBANY, N. Y., May 6, 1912.

"Re: Question on repair of High Dam, Oswego River.

"MR. EDWIN STYRING,

"Division Engineer,

"Syracuse, N. Y.:

"DEAR SIR.—Referring to your recent letter in the matter of the repair of High Dam on the Oswego River, I understand that recently another portion of this dam has gone out.

"Will you kindly answer me in detail, the following questions:

"1. What in your judgment is the earliest possible moment that the work of repairing this Dam can be begun?

"2. What in your judgment would the probable cost be?

"3. How long, in your judgment, would it take to complete the work?

"4. Should this work be done, in your judgment would the rest of the old dam stand the pressure of the water elevation necessary to maintain navigation this year?

"5. Would the new work and the old part of the dam stand the strain of the probable freshets of next spring?

"6. Please state what in your judgment would be the most suitable construction for the repair of this Dam?

"Please favor me with a detailed answer to each of the above questions at your earliest convenience.

"Very truly yours,

"(Signed) D. W. PECK,

"Superintendent of Public Works."

"(Copy)

XXIV

On May 9, 1912, Mr. Styring, division engineer, wrote the Superintendent of Public Works in answer to his letter of May 6, 1912, as follows:

"STATE OF NEW YORK

"DEPARTMENT OF STATE ENGINEER AND SURVEYOR, MIDDLE
DIVISION

"SYRACUSE, N. Y., May 9, 1912.

"ES. H.

"Subject: Oswego Canal. High Dam Repairs.

"Hon. D. W. PECK,

"*Supt. of Public Works,*

"Albany, N. Y.:

"DEAR SIR.—I beg to acknowledge receipt of your letter of May 6th in the matter of repairs to High Dam in the Oswego River.

"Below I have endeavored to answer to the best of my ability the six questions regarding the repairs to the dam, which you have submitted to me.

"No. 1.—Owing to the continuance of high water in the river the work of restoring the level cannot probably be started before the 1st of June, but the delivery of materials for the repairs could commence at once.

"No. 2.—About \$43,000.

"No. 3.—The length of time required to do the work is a matter of conjecture, but I would say at least two months.

"No. 4.—As to whether the remaining old portion of the dam would stand the head of water necessary to maintain the level is a matter impossible to determine. It has stood the heaviest flood we have had in many years, but for that matter that might also be said of the portion that went out.

"If the responsibility rested with me, I would hesitate a long time before I would accept as sufficiently secure for two more years the use of the remaining portion of the old dam.

"No. 5.—This question is in part answered in No. 4. During the time of freshets the changes of the old portion of dam remaining would of course be greatly lessened.

"No. 6.—I believe the cheapest construction for restoring the canal level above the dam would be a series of stone-filled timber cribs, spaced say 20' apart in the clear with heavy timber wales extending from crib to crib against which interlocking

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steel sheet piling could be driven. The estimate of \$43,000 noted in answer No. 2 is based on this style of construction.

"You will recall that a short time ago you asked me for an estimate of cost as to repairs to the dam, and I reported to you \$30,000. Since then a portion of the west abutment of the dam has failed, hence the increased cost of repairs from \$30,000 to \$43,000.

Very respectfully,

"(Sgd.) EDWIN STYRING,

"Division Engineer."

"Copy.

XXV

The State of New York, through its officers, agents and servants, failed and neglected to restore the portion of old High dam that was washed out and consequently navigation in the existing canal could not be resumed or the dredging of the channel of the river in the wet could not be made.

XXVI

Claim 37 — Item C

On the 28th day of May, 1912, the claimant wrote the Superintendent of Public Works and also the Canal Board, requesting that the necessary steps should be taken to repair old High dam so that he could prosecute work under his contract in an orderly manner, and thereafter a proceeding was instituted by the claimant against the Canal Board and the Superintendent of Public Works in which he demanded a peremptory writ of mandamus commanding and requiring the Canal Board and Superintendent of Public Works to repair the dam.

XXVII

Among the affidavits filed on behalf of the State upon the return of the order to show cause in said mandamus proceeding was one made by Hon. D. W. Peck, Superintendent of Public Works, which is as follows:

"STATE OF NEW YORK, }
COUNTY OF ALBANY, } ss.:

"Duncan W. Peck, being duly sworn, says that he is now and was during all the times hereinafter mentioned the Superintendent of Public Works of the State of New York.

"That as such Superintendent he has charge and is familiar with the physical conditions of the entire canal system of the State of New York; that there is about six hundred miles of said canal system; that deponent is charged with the duty of superintendency of said canals and the keeping of the same in condition for navigation and with the keeping of the same in repair.

"That in order to keep the navigation on the said canals open, it is necessary and has been for a number of years last past necessary to expend considerable amounts of money in extraordinary repairs, such as breaks, washouts, leakages and other accidents that may happen to said canal.

"That the Legislature of 1912 appropriated for extraordinary repairs on the entire six hundred miles of said canals one hundred twenty-five thousand dollars.

"That deponent is entirely familiar with what is known as the high dam in connection with the Oswego Canal; that said high dam controls the navigation on said canal below Lock No. 14.

"That on or about the first day of April, 1912, one hundred sixty feet of said dam was destroyed by reason of the Spring floods; that on account of the extraordinary high water during the Spring of 1912, it was impossible to repair the damage to said canal and up until within a few days last past, to ascertain definitely the extent of the injury to said dam.

"That as soon as the water subsided to an extent sufficient to allow a proper examination to be made of said dam and the injuries thereto, deponent had the same examined by Division Engineer Edwin Styring, in charge of that portion of the canal.

"That at the request of deponent, said Division Engineer made an estimate of the cost of repairs to said dam and that said Division Engineer reported to deponent that it would cost to make the repairs to said dam, between forty and fifty thousand dollars; that deponent also caused said Division Engineer to report to deponent as to the condition of the remaining portion of said dam and as to the likelihood and probability of the remaining portion of said dam being sufficiently strong to withstand the water pressure in case the destroyed portion of said dam should be replaced; that said Division Engineer reported to deponent in the following

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language: 'If the responsibility rested with me I would hesitate a long time before I would accept as sufficiently secure for two more years the use of the remaining portion of the old dam.' Said Division Engineer also stated that the freshets of next Spring would very greatly reduce the chances of the old dam remaining.

"That deponent has asked for estimates as to the repairs on this dam from other engineers and said engineers have reported to deponent that the cost of said repairs would be in the neighborhood of fifty thousand dollars.

"That in order to make said dam in any way secure and able to withstand the water pressure in case the destroyed portions of the same should be rebuilt, it would be necessary to materially strengthen and repair the remaining portion of said old dam; that the expense of repairing said remaining portion would be very large and the money expended in making said repairs and in strengthening the remaining portion of said old dam would be practically thrown away for the reason that Contract No. 37, which the relator herein is performing, provides for the construction of a new dam below high dam, which will so raise the canal levels that high dam, the one in question, will be pulled out and destroyed and that Contract No. 37 provides for the removal of high dam; that the only use of said high dam, in case this large amount of money should be expended upon these repairs, would be for one year and a fractional portion of the present year.

"That for some time past there has been practically no navigation upon the Oswego Canal and that the expenditure of this large amount of money to repair said dam in order to open the same for navigation, would accommodate very little navigation.

"That deponent is familiar with the time necessary to accomplish such work as the repairs to this dam; that it would take at least two months to repair this dam; that the condition of the water is such that in the ordinary course of events it would take to practically the first of September, 1912, in order to repair this dam.

"That it is a physical impossibility to repair said dam in time to open the navigation of said canal before the latter part of August or the first of September, and that by reason of the pro-

visions of Contract No. 37, requiring the removal of this dam within the next year, the money expended in such repairs would be practically wasted.

"That the only fund available for the repair of said dam is the one hundred twenty-five thousand dollar appropriation, heretofore mentioned, and the expenditure of such a large portion of said money for the repairs of this dam would so deplete said appropriation that in the event of any accidents or breaks in the other portions of the canals of this State, there would be no funds available for their repairs.

"That the navigation upon the other parts of the canal systems of this State is very large and the interference with such navigation by reason of any breaks or accidents to the canal so as to interfere with navigation on the other portion of said canal, would be very serious and result in very great inconvenience and very great damage to the public engaged in navigation upon the other portions of said canal.

"Deponent further says that the injury to said dam was in no way caused by negligence of deponent, of the Canal Board, or of any of the officers or employees connected with the Department of Public Works or with the Canal and was due solely to the unusually high waters.

"That the only fund which could be used in the repairs of said dam was in the appropriation of one hundred and twenty-five thousand dollars, heretofore mentioned, and in the opinion of deponent, the expenditure of so large a sum in the making of such repairs for so short a time would be very bad management and would naturally subject deponent and the Canal Board to criticism, especially in view of the dilapidated and unstable condition of the remaining portion of said dam.

"That it is practically a physical impossibility to repair said dam so that the navigation on said canal could be resumed within the time prescribed in Chapter 282 of the Laws of 1912, and that the statutes of the State provide for the closing of the navigation on said canal on the 15th day of November, and to expend this large sum of money to provide for so little navigation for so short

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a time, is, in the opinion of deponent, unwise and would amount to practically a waste of so large a sum of the moneys of the people.

D. W. PROK.

"Subscribed and sworn to before me
this 11th day of June, 1912.

"ALFRED M. O'NEIL,
"Notary Public."

XXIX

On the 15th day of June, 1912, the Special Term of the Supreme Court handed down a decision denying the claimant's application for a mandamus, which decision on appeal to the Appellate Division, Fourth Department, was affirmed in October, 1912, and the expenses incurred by the claimant in such litigation, fees and disbursements, was the sum of \$570, for which he asks to be awarded judgment.

XXX

The justice of the Supreme Court who heard the claimant's application for mandamus filed an opinion, giving the reasons for his denial of the application, in which he states: *First*, that the claimant has an adequate remedy to recover whatever damages he may incur because of the failure of the State to keep the canal open, under section 47 of the Canal Law, and *second*, in view of all the facts in this case he believed it would be an abuse of his discretion to grant the application. No costs were allowed either party on the dismissal of the proceeding.

XXXI

Claim 37 — Item A

Upon the removal of old High dam by the contractor the spoil area for the material was designated on the plan, Exhibit 10, in the river north of said dam and between stations 1100 and 1117.

XXXII

The water in the pool north of old High dam between stations 1100 and 1117 prior to the building of dam 6 was controlled by

old Curved dam at Oswego; the elevation of the same being 266.22, and until the completion of dam 6 the water in this pool would not be of sufficient height to permit the flotation of boats for the spoiling of material from old High dam in said spoil area.

XXXIII

The plan formulated by the claimant for the performance of the work under contract 37 was in substance to dredge the Fulton pool above Battle island dam in the season of 1911, and also to excavate such earth as could be made in the dry in the cut-off below Battle island dam; also to install a dredge at Oswego below lock and dam 6 and dredge out the earth excavation. It is also planned to commence the work on lock and dam No. 6 as early as possible in the season of 1912 and to complete the same by the fall of 1913; it was also planned that lock and dam No. 5 at Minetto could be constructed during the same season and that during the spring and summer of 1913 the channel between High dam and lock and dam 5 at Minetto could be dredged, and that the old dam could then be removed and the contract completed by the 1st day of May, 1914.

XXXIV

According to the contract plans and specifications the work to be done between stations 983 and 1034 consisted in excavating 149,975 cubic yards of material, of which 94,484 cubic yards were loose material, and 55,491 cubic yards were rock, and under the plans formulated by the claimant this excavation was designed to be performed in the wet by means of a rockbreaker and large dredge, and the material removed placed upon scows and floated to the place designated for spoiling.

XXXV

After old High dam was washed out the rockbreaker and dredge could no longer be floated in the pool between stations 983 and 1034, and consequently the excavation in the wet was no longer practical, and thereupon the claimant concluded to make the excavation between stations 983 and 1034 in the dry. This

necessitated the construction of cofferdams to prevent the water running over the channel designated upon the plans for excavation, the drilling and blasting of the rock within the channel, the installing of a steam shovel for excavating the material, and engines, cars and railroad tracks with which the material dumped from the shovel could be conveyed to the spoil banks and discharged.

XXXVI

The plans accompanying contract 37, sheets 16 and 17, show that the material to be excavated between stations 983 and 1034 was to be spoiled in the river between stations 1050 and 1095. This area was not available for spoiling purposes except in the event that the material was removed by the wet method. After High dam had washed out and it no longer being feasible to excavate the channel in the wet, the State designated a new spoil area for the material to be excavated between said stations, which was not indicated or shown on the plans; that by so designating a new spoil area the State recognized the changed conditions calling for a different method of making the excavation and approved of the plan for doing the work by the dry method.

XXXVII

Under the provisions of the contract, a lump sum of \$38,000 was bid for cofferdams, pumping, bailing and draining. Under the special specifications, No. 33s, it is provided that "the item of cofferdams, pumping, bailing and draining will be apportioned as follows:

Lock 5 and bulkhead.....	35 per cent
Dam 5 and abutment.....	20 per cent
Wall on west bank at Minetto and miscellaneous work	5 per cent
Lock 6	20 per cent
Dam 6, abutment and bulkhead.....	20 per cent

100 per cent"

It thus appears that the lump sum bid for cofferdams, pumping, bailing and draining provided for by the specifications was for the cofferdams necessary in the construction of dams 5 and 6, and their locks and abutments.

XXXVIII

The claimant, after acquiring and installing a plant for doing the work by the dry method, proceeded to erect the necessary cofferdams and make the excavations required between stations 983 and 1034 at a cost of \$241,682.37, which itemized as follows:

Construction and removal of cofferdams.....	\$76,573 37
Liability insurance	8,645 22
Plant depreciation and interest.....	9,232 15
Supplies	30,760 38
Labor	116,471 25

\$241,682 37

The above expenditure was necessary, reasonable and proper, and is not disputed by the representatives of the State.

XXXIX

The cofferdams, pumping, bailing and draining made necessary by doing the work of excavating the channel between stations 983 and 1034 were not included within the plans and specifications for which a lump sum was bid by the contractor, but it was made necessary in order to do the work in the dry.

XL

At the time that old High dam was washed out the claimant had on the site of the contract above Battle island dam one two and one-half yard Standard Marion dipper dredge, built in 1911; three scows of 200 yards capacity each; two tugs with coal scows and launches, which dredging plant and equipment and the necessary small tools and appliances necessary thereto were of the value of \$50,000; that he also had a standard Lobnitz rockbreaker

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with a thirty-ton ram in good condition available on the site at a cost not to exceed \$12,000.

XLI

The rate of wages of employees connected with the dredging plant was as follows:

Day superintendent	\$250 00	per month
Night superintendent	125 00	per month
Engineer or runner	125 00	per month
Crane man	90 00	per month
Oiler	60 00	per month
Fireman	60 00	per month
Deckhand	50 00	per month
Inspector	75 00	per month
Tug captain	100 00	per month
Tug engineer	90 00	per month
Tug fireman	60 00	per month
Scowman	50 00	per month
Launchman	60 00	per month
Coal man	60 00	per month
Yard man	2 50	per day
Foreman of yard gang	100 00	per month
Captain of rockbreaker	200 00	per month
First engineer	125 00	per month
Second engineer	100 00	per month
Fireman	60 00	per month
Deckhand	50 00	per month

XLII

It was practicable to regulate the work in three shifts of eight hours each during a part of the months of April and December, and all of the months of May, June, July, August, September, October and November.

XLIII

During the period contemplated by said contract the average price of coal used in the dredging equipment and rockbreaker was \$2.50 per ton delivered on the bank of the river. The prevailing

price of wire rope used on dredges was 55-2 21½ off list; that the average price of wire rope used on the rockbreaker was \$5 per foot; a drill boat could be purchased and placed upon the site for \$12,000. It required a crew of fifteen men at a total labor cost of \$40.29 per shift; 40 per cent dynamite cost 12 cents per pound, lubricating oil cost 30 cents per gallon, the exploders cost four cents each, and the liability insurance was 4 per cent of the payroll.

XLIV

The rock between stations 983 and 1034 was in layers nearly horizontal, dipping from north to south about eight inches in 100 feet; the layers were from six inches to two feet in thickness; the surface of the rock was criss-crossed with vertical fissures or seams, forming what is geologically known as jointed structures; the lower or thicker layer was harder and of a reddish color. The upper layers could be removed by a two and one-half yard Standard Marion dipper dredge, but the lower layer would have to be broken up either by blasting or by the rockbreaker before its removal.

XLV

The Standard Marion two and one-half yard dipper dredge which the claimant intended should be used in dredging the channel of the river between stations 983 and 1034 was installed in the pool between Battle island dam and the city of Fulton, and had been used in dredging the river from the upper end of contract 37 down to the Battle island dam. The intention was to move it from that pool down to the High dam pool for the purpose of dredging the channel in that pool. It was found, however, that the hull, or boat upon which the machinery of the dredge was installed, was too wide to pass through the locks of the old canal, and therefore another method of removing the same would have to be adopted; such removal could be made at an expense approximating \$5,000.

XLVI

The breaking up of a rock by a rockbreaker would cost less than breaking up the rock by the use of a drill boat. The reason-

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able cost of excavating the material between stations 983 and 1034 by the wet method by the use of the dredge and rockbreaker was \$129,331.

XLVII

The reasonable cost of excavating the material between stations 983 and 1034 in the dry was \$112,351.37 more than would have been the reasonable cost to have excavated the same by the wet method with the use of the dredge and rockbreaker.

XLVIII

Claim 37 — Item B

The contract plans and specifications required lock and dam No. 6 and attendant structures to be made of concrete; such concrete would require approximately 50,000 cubic yards of sand and gravel.

XLIX

The most available and most economical supply of sand and gravel to be used in making such concrete in the construction of said lock and dam was at Indian point near Fulton on the west side of the Oswego river north of Grass island. The bank was so located that it could be shoveled into boats, the boats flooded across the river and enter the canal and thus floated to the site of lock and dam 6 for use.

L

The claimant's assignor and the claimant himself relied upon said means of transportation in entering into said contract and in accepting an assignment thereof.

LI

After a portion of the High dam was washed out on April 1, 1912, and after the failure of the State to restore the same the claimant was unable to transport the sand and gravel by water below lock 12 of the old canal and he was therefore compelled to construct a railroad track from lock and dam 6 to lock 12 of the old canal, approximately four miles in length, and to equip the same

with engines and cars, and in that way to transport the sand and gravel from its bank to lock and dam 6 to be used in manufacturing the concrete with which to construct such lock and dam.

LII

The reasonable cost of delivering the sand and gravel by rail from lock 12 to dam 6 was \$32,564.16; that claimant received from the sale of rails which had been used in the construction of said railroad, \$7,115.12; that the reasonable cost of transporting such sand and gravel by boat from lock 12 to dam 6 was \$3,420.79, leaving a balance of \$22,028.25, as the amount of damages which claimant suffered by reason of his being deprived of the use of the old canal in the transportation of such sand and gravel.

LIII

Claim 37 — Item D

The claimant purchased as a part of his equipment for doing the work under contract 37, two canal boats of the value of \$1,000; that upon the 1st of April, 1912, at the time that a portion of old High dam was washed out, said boats were in the old canal below lock 15 in the level controlled by said old High dam; that on account of the washing out of that dam said boats were left stranded in the canal and became a total loss; that by reason of the washing out of said dam and the failure of the State to repair the same, the claimant suffered damages in the sum of \$1,000.

LIV

Claim 38

Under the method, manner and sequence formulated by the claimant for doing the work under contract 37, he could have completed the same in accordance with the terms of the contract on or before May 1, 1914, had he not been delayed by the washing out of the old High dam.

LV

By reason of the delay caused by the washing out of old High dam, thereby depriving the claimant of his ability to procure sand and gravel for making the concrete, he was unable to complete lock and dam 6 and lock and dam 5 and the excavation of the channel between stations 983 and 1034 until late in the fall of 1914, and also was prevented from finishing the land cut at Battle island, the rock excavation in the Minetto pool, and the removal of the cofferdams until the 1st day of December, 1915, at which time the work under the contract was completed.

LVI

The claimant paid for premiums on faithful performance bond from May 1, 1914, to December 1, 1915, \$18,398.32.

LVII

The claimant paid for office help and office rent from May 1, 1914, to December 1, 1915, \$14,170.

LVIII

The claimant paid for rental of telephone from May 1, 1914, to December 1, 1915, \$135.

LIX

By reason of the delays specified in above finding No. 55, and the payments made under findings 56, 57 and 58, the claimant suffered damages in the amount of \$32,203.32.

LX

Claim No. 40

The bulkheads and gates of dam 6, according to the plans and specifications, and as constructed, extended to the bank on the western end of the dam, and consisted of twelve gates, and in front of the gates and about twenty feet down stream therefrom there extended a strip of land from the bank out into the river opposite most of the gates. It was a slope running up from the

apron of the dam ten or twelve feet high and belonged to the city of Oswego. The first appropriation of land was that of the Oswego Country Club, to be the site of the bulkhead and dam 6 and was approved by the Canal Board August 9, 1910, and filed in the Oswego county clerk's office October 3, 1910. On September 8, 1910, another appropriation map of said site was approved by the Canal Board and filed in the Oswego county clerk's office October 18, 1910. On December 15, 1910, the Canal Board approved another appropriation map of the site of these bulkhead gates and the same was filed in the Oswego county clerk's office February 6, 1911. The map approved by the Canal Board August 9, 1910, and the map approved by the Canal Board September 8, 1910, in so far as they refer to the river bank appropriation were the same, and the map approved by the Canal Board December 15, 1910, extended the river bank appropriation northward fifteen feet. It didn't, however, cover the point of land belonging to the city of Oswego.

LXI

The claimant requested the State Engineer and the Canal Board to appropriate the land opposite the gates in order to provide a tail race for the water flowing through the gates and thus control the flow of water and enable him to close the space left open in the dam which had theretofore taken care of the flow of the water of the river. The State Engineer and Surveyor had the authority to appropriate the land owned by the city of Oswego if in his judgment he deemed it necessary, and the Canal Board had the power to approve such appropriation.

LXII

The State Engineer did not deem it necessary to appropriate the above-mentioned lands and neglected to do so.

LXIII

After the neglect or refusal of the State officers to appropriate the lands above mentioned, the claimant entered thereon and

excavated 14,520 cubic yards of such land in front of the bulk-head gates; that 710 cubic yards of such material were used by him on a road which he was constructing along the bank of the river, but which was not involved in any pending claim in this case, and the remainder, 13,810 cubic yards, was utilized by him in making cofferdams.

LXIV

Under the provisions of the contract, the plans and specifications, claimant was entitled to \$1.74 for excavating per cubic yard, which upon the material excavated and used by him upon the contract would amount to \$24,029.40. The statute, however, has vested in the State Engineer the power of determining the necessity of appropriating lands according to his judgment and discretion, and subject to the approval of the Canal Board. The State Engineer having refused to appropriate the land in effect has found that the appropriation was not necessary. Under the evidence I am not justified in finding otherwise.

LXV

Claim No. 41

After the completion of dam No. 6 and lock 6 on the eastern end of the dam adjacent to the bank of the river, it became necessary to have additional material to make the backfilling between the wall of the lock and the bank of the river. The material excavated from the bed of the lock in the river had been thrown up against the bank and utilized in part for such backfilling, but was not sufficient. This work could not well be performed until after the removing of the plant from which the concrete was mixed, out of which the dam and lock were constructed, and inasmuch as such construction did not occur until about the 1st of January, 1915, it had to be made after that time and after the removal of the mixing plant. No borrow pit was shown upon the plans from which it was specified that the material should be taken for the backfill at this place, and thereupon the contractor, pursuant to the provisions of the contract, called upon the engineering

department of the State to designate the borrow pit from which he could acquire material for such backfilling. A number of letters passed between the contractor and the engineering department with reference thereto, in one of which it was stated: "Should the contractor prefer, there is material between the lock and road that we could permit him to use, subject to such restrictions as you would deem wise to impose. I would not think it advisable to permit him to excavate outside of lines prescribed by us, or that would endanger the road or street."

He thereupon proceeded to excavate the necessary earth from the river bank opposite the lock wall to make the backfilling, acting upon the suggestion made by the resident engineer in the foregoing letter.

LXVI

The contract provides — specification 22: "Material to be borrowed shall be taken from borrow pits shown upon the plans and if sufficient suitable material is not found in them it shall be taken from the nearest available location selected by the engineer. The material taken therefrom, excepting the material for filling cofferdams, shall be classed as excavation and all the specifications for that item as hereinbefore made shall prevail."

LXVII

At the time that the backfill above mentioned was made there wasn't any material that thereafter was to be excavated, pursuant to the terms of the contract, that could be used for this backfill, except the rock in the pool below the dam, which was suitable for filling behind the guide wall, but was not desirable for backfilling of the lock wall.

LXVIII

The contractor excavated 4,220 cubic yards of earth for the backfill above mentioned, which at the contract price of \$1.74 per cubic yard would amount to the sum of \$7,342.80.

LXIX

Claim No. 42

It was necessary for the contractor, in constructing the dams, under the provisions of the contract to shut the water flowing in the river off from the portions of the dam under process of construction. This was done by the construction of cofferdams. Such cofferdams were constructed during the summer of 1914 at an elevation of about 273, of a sufficient height to take care of the summer flowage of the river and about one foot above. After the construction of such cofferdams and about September first of that year, the water in the river suddenly rose without any apparent reason from rains or other climatic occurrences, overflowed the cofferdams, flooding the same and compelling the contractor to abandon his work for four or five days.

LXX

On the 24th of August, 1914, a leak developed under a new dam that had been recently constructed at the outlet of Cayuga lake. This dam was constructed by the State, designed for the use of the canals, and after its construction passed under the jurisdiction of the Superintendent of Public Works. On that date the dam was inspected by the Assistant Superintendent of Public Works and a representative of the State Engineer, and after such inspection the tainter gates in the dam were opened in order to relieve the pressure upon the dam and equalize the water upon the upper and lower sides thereof. These gates remained open until August 29, 1914, when they were partially closed. After the opening of such gates there was a large increase in the flow of the water, causing the surface thereof to rise throughout the length of Seneca river and that of Oswego river. The distance through such rivers would take four or five days for it to reach the cofferdams in question.

LXXI

No notice was given by the officers of the State to the contractor of the opening of the tainter gates at Cayuga or an opportunity

given him to make provision against the coming flood. It was the opening of such gates that caused the flood from which claimant's cofferdams were overflowed and claimant's work necessarily suspended.

LXXII

The State authorities opening the gates of the dam at Cayuga and permitting such a heavy flow of water to descend down upon the contractor's works without notice to him was unauthorized and negligent.

LXXIII

The flooding of the contractor's cofferdams prevented the contractor from performing his work under his contract in the orderly manner and method of performing such work, and the work to be performed by him under his contract with the State was made more expensive than it otherwise would have been, and increased such cost in the sum of \$862.25.

LXXIV

Claims Nos. 43 and 45

Claimant excavated 86,685 cubic yards of material below grade in the performance of his work under his contract. At the contract price of \$1.74 per cubic yard this item would amount to \$150,831.90.

LXXV

Claimant excavated 11,036 cubic yards of material beyond lines in the performance of the work under his contract; 5,116 cubic yards of which were excavated under this contract at \$1.74 per cubic yard, making \$8,901.84; and 5,920 cubic yards of which were excavated under alteration order No. 7 at \$1.14½ per cubic yard, amounting to \$6,778.40, making a total of \$15,680.24.

LXXVI

The contract, specification 18, provides: "Excavation shall consist of the loosening, loading, transporting and depositing of all material, whether wet or dry, of every name and nature necessary to be removed for the purpose of forming the canal prism,

ditches, pits for structures, for obtaining material from borrow pits, or for any other purpose necessary to complete the work under contract, except as noted in paragraphs 16, 16a and 17."

Specification 21: "Excavation shall be made only to such lines and grades as are shown on the plans as hereinafter specified, or as may be fixed in accordance with the plans and specifications from time to time by the engineer. Where structures occur the lines and grades shown on the plans shall be considered as approximate only and they will be fixed by the State Engineer in writing, as circumstances require, to give a satisfactory structure. * * * No rock or other material shall project inside the established lines of the cross section, and all projections which, in the opinion of the engineer, may cause damage to boats shall be trimmed or broken off as required. If it appears during the progress of the work that flatter slopes than those shown on the drawings or sides of excavation will be advisable, the State Engineer may direct in writing that such material shall be excavated to an amount sufficient to secure stability."

Specification 24: "The volume of all excavated material for which the contractor will be paid shall be that occupied by it before its removal. The maximum limit of such volume shall not exceed those defined upon the plan or fixed by the engineer as specified in paragraph 21. The volume shall be determined by measurement taken before and after its removal; excavation will be paid for only once. All cost of rehandling material must be included in the contract price for original excavation. * * * Any excavation below or beyond the lines shown on the plans which may be required in writing by the State Engineer will be paid for at the contract price for excavation, which price shall also include payment or disposition of the material in the spoil banks."

Specification 25b: "The contractor is to so construct his work that the typical prism width and depth will be conformed with as closely as practicable. * * * The engineer may change the limits of excavation if necessary for a proper adjustment to the local conditions, as specified in paragraph 21."

Specification 25i: "The quantity of excavation for which the

contractor will receive payment at the contract price shall be determined by measurement of the area included within lines described as follows: The surface limit shall be natural outline as determined by measurements taken just before dredging is begun. The bottom line shall be the grade line shown upon the plans. The side limits in rock or similar material shall be those shown upon the plans and the side limits in soft material shall be those shown upon the plans for a 1 on 2 slope, except where flatter slopes are ordered as described in paragraph 25c. No payment will be made for any excavation outside of the lines above described."

LXXVII

The engineer made no change in writing of the plans and specifications of the lines or grades established for excavation by reason of the occurrence of structures or other local conditions, or for any excavation below or beyond the lines shown upon the plans.

LXXVIII

It is not practicable for the contractor to excavate rock that has to be drilled and blasted exactly to the side and grade lines established for the canal prism, and therefore it is customary to drill, blast and excavate slightly beyond the lines and below the grade in order to prevent the necessity of going back and clearing out such rock as might be left within the lines and above the grade, it being more economical to drill a little deeper and a little beyond the lines than it would be to have to go back and do the work partially over again.

LXXIX

The engineer made no order for channeling the rock and the contractor performed no channeling work.

LXXX

The material within the lines and above the grade constituting the channel has been paid for by the State; that which was outside of the lines and below the grade has not been paid for.

LXXXI

Claim No. 44

Upon the site of contract No. 37, at a point below Battle island dam on the west shore of the river was a water pipe used by Mr. Washburn for supplying water to his residence, barns and buildings. The contractor was permitted to spoil material in behind Battle island in the deeper holes and the silt from the material that he spoiled in there ran around the end of the pipe and stopped the flow of water therein. Mr. Ellis, the assistant engineer in charge of Barge canal contract No. 37, directed the contractor to raise the end of the pipe up from the bottom of the river and pursuant to such directions the contractor did raise the pipe off the bottom of the river.

LXXXII

There was located near the upper end of the Minetto retaining wall in the village of Minetto on the west side of the river and on the site of said contract a pipe which was placed there by Mr. Benson under a permit from the State, which permit was issued by the State after contract No. 37 had been entered into. In removing cofferdams with the dredge the dipper hit against the pipe and the pipe was broken and the water supply cut off. Mr. Ellis, the assistant engineer in charge, under the direction of the resident engineer, told the contractor or his superintendent that the pipe had been damaged and must be repaired, and to go ahead and if the State was responsible it would have to pay for it. The pipe was not a part of the canal or river bed at the time the contract was taken over by the claimant herein. Mr. Ellis, the assistant engineer, directed his assistant to place buoys on this pipe previous to the time the excavation was made and that the buoys were there at the time the pipe was damaged and Mr. Ellis saw them there himself.

LXXXIII

The services rendered by the claimant for work done upon said Washburn and Benson pipes was of the value of \$153.

LXXXIV

Claim No. 46

In the year 1914 the State of New York passed a statute relating to compensation insurance, which law became effective July 1, 1914. By its terms all employers of labor in hazardous employment were compelled to take out compensation insurance, or satisfy the committee appointed under the statute of his financial ability to pay such compensation himself. The work of the claimant under and pursuant to said contract was hazardous work according and pursuant to the terms of said statute; that claimant consequently did take out compensation insurance pursuant to such statute.

LXXXV

The claimant paid for such compensation insurance from July 1, 1914, until the completion of the work under the contract, \$4,671.82, the rate being .062868 on the payroll, approximately $6\frac{1}{4}$ per cent.

LXXXVI

Prior to the passage of the aforementioned statute, the claimant had taken out liability insurance, and the premiums and liability based upon such insurance were at the rate of 4 per cent upon the payroll; that the premium upon liability insurance from July 1, 1914, to the time of the completion of the contract at the rate of 4 per cent upon the payroll would have amounted to \$2,972.46. The difference between the premium paid under the provisions of the statute and that which he had been paying would amount to \$1,699.36. No evidence was submitted showing whether or not the claimant received additional benefits under the compensation insurance policy.

LXXXVII

Claim No. 47

On November 15, 1914, the employees of the Department of Public Works, pursuant to the orders of O'Brien, Assistant Superintendent of Public Works, negligently and without notice to the

claimant, opened all of the tainter gates of the Phoenix dam at Phoenix, thus increasing the flow of the water in the river from 3,550 cubic feet per second to 9,900 cubic feet per second. The result was that about 7:30 o'clock of that evening the cofferdam constructed by claimant between stations 1017 and 1034 was flooded out, destroying in part the cofferdam and preventing claimant from continuing his work therein, in consequence of which he suffered damages in the sum of \$7,388.95. This item of damage, however, was included in the actual expenditures made by the claimant as shown by finding 38 herein, and was consequently allowed in the disposition made of claim 37, item A.

LXXXVIII

Claim No. 48

According to the plans a storehouse was to be built by claimant east of the easterly wall of lock 6 at a place to be designated by the engineer. After considerable correspondence between the claimant and the engineers the resident engineer, Mr. Burden, directed Mr. Haley, the assistant engineer, to locate and lay out where the storehouse should be placed. Pursuant to such directions, Mr. Haley located and laid out the place where the storehouse should be built. The location was upon the side of the bank and it became necessary to excavate a space sufficiently large for the construction of the storehouse. Thereupon the claimant proceeded to excavate the material and build the storehouse. The quantity of material excavated amounted to 277 cubic yards of earth at \$1.74 per yard, which amounted to \$481.98. This claim was originally reported in the monthly statement and by direction of the Special Deputy State Engineer, Mr. LaDu, was paid, but in the final estimate it was left out and the payment made thereon was charged up against the claimant.

LXXXIX

Claim No. 49

The zero station on contract 37 was 659-25. In the final estimate the zero station was placed at 659-50. The changing of the

zero station resulted in a deduction from the material excavated by claimant of 159 yards. In the monthly estimate this 159 yards of excavation was allowed and paid for, but in the final accounting it was omitted and the amount paid charged up against the claimant.

XC

Claimant actually removed said 159 yards of excavation, and at the contract price of \$1.74 per cubic yard, it amounted to \$276.66, which item of damages he suffered by reason of the change of the zero station.

XCI

Alteration Orders

No. 1. On September 27, 1911, an order was made providing for the flattening of the side slopes between stations 660 and 680.

No. 2. On January 11, 1912, an order was made increasing the strength, class A gate hoists, and extending dock west of lock No. 5.

No. 3. On March 11, 1912, an order provided for an isolated crib at upper end of lock No. 5.

No. 4. On June 11, 1912, an order provided for increased sections at dams 5 and 6 and for the excavation of old dyke lock 6 and the excavation of lock above bulkhead 6.

No. 5. On July 6, 1912, an order provided for increased strength operating plan forms bulkheads 5 and 6.

No. 6. On August 12, 1912, an order provided for additional cofferdam pumping, etc., on account of alteration order No. 4.

No. 7. On December 10, 1912, an order provided for adding to contract 37 part of contract 35 from stations 1164 to 1172, in which it was agreed that the excavation provided for by that order should be at the rate of \$1.14½ per cubic yard.

No. 8. On May 2, 1913, an order provided for an increase in size of the field office.

No. 9. On December 13, 1913, an order provided for the substitution of line drilling for channeling.

No. 10. On December 18, 1914, an order was made for a change in the walls and gates on the Varick canal lock.

XCII

State's Counterclaim

Section 16 of contract 37 provides: "The parties mutually agree that time is of the essence of this contract and that the damages to the State for failure of the contractor to have fully completed the work on or before the date last mentioned shall be \$100.00 per day for each day after said date that shall elapse before the work shall be fully completed, which amount shall in no event be considered as a penalty, or otherwise than the liquidated and adjusted damages of the State because of said delay, and which damages the contractor shall promptly pay, and which damages the Superintendent of Public Works may retain from any moneys which otherwise shall be payable to the Contractor, and in the event that the moneys payable as aforesaid are not sufficient to fully compensate the State because of such delay, then the Contractor promises and agrees to pay the balance of said damages to the State promptly upon demand by the Superintendent of Public Works."

The time fixed by the contract for the completion of the work was the 1st day of May, 1914, and the date upon which the work was actually completed was the 1st day of December, 1915, as appears by finding of fact herein, No. VI. The number of days intervening would be 579, which at \$100 per day would amount to \$57,900.

XCIII

After the completion of the work upon the contract and the acceptance thereof by the State, as appears by previous finding of fact, No. VI, a final account was rendered by the State, which was approved by the Canal Board, and the balance due, as shown by such account, was paid to the claimant on July 21, 1916, as appears by former finding of fact No. VII; that the amount so paid exceeded the amount of the liquidated damages now claimed by the State, but neither the State Engineer nor the Superintendent of Public Works deducted the amount of such claim, or made any claim that they were entitled to retain the same.

XCIV

The cause of the delay of the contractor in completing the work under the contract already appears in findings of fact Nos. XIV, XV, XVI, XVII, XXV, XXXIII and XCI. The change in plans rendered necessary by the washout of the old High dam and the work performed under new plans as detailed in prior findings prevented the claimant from completing the work under the contract until December 1, 1915. The washout of the dam was without fault on the part of the claimant.

CONCLUSIONS OF LAW

I

The Statute of Limitations did not commence to run upon any of the claims herein allowed until the 13th day of July, 1916, the date on which the engineers presented their final account and the payment thereon approved by the Canal Board. The notice of intention to present a claim and the filing of the claim upon which these proceedings were instituted were served and filed upon and with the proper officers and within the time specified by the statute. Consequently the Statute of Limitations has not become a bar to any of the items allowed herein.

II

The structure known as old High dam, situate upon the site of contract 37, was constructed by the State as a part of the canal system and was under the jurisdiction and control of the Superintendent of Public Works, whose duty was to keep it in repair and maintain it for the purposes of navigation of the canal until the contractor herein could complete dam 6 and lock 6, and dam 5 and lock 5, so that boats navigating the canal could be turned into the river and proceed upon their course. Such work could not have been completed by the contractor until the fall of 1913, at which time it became his duty to remove old High dam.

III

Old High dam and its abutment were in an unsafe and defective condition on August 1, 1911, at which time the abutment was repaired in part, but the dam was permitted to remain unrepaired until April 1, 1912. The Commissioner of Public Works and the engineering department of the State knew of such defective and unsafe condition and became guilty of negligence in failing and neglecting to repair the same, and that as a result of such negligence a portion of the dam was washed out on the said 1st of April, 1912, without fault of the claimant and the State became liable for any damage suffered by him therefor.

IV

Claim 37 — Item A

By reason of the acts above described the work of the claimant in excavating material required by the contract between station 983 and 1034 was made more expensive than it otherwise would have been had the dam been maintained in its place. Such increased cost amounts to \$112,351.37, which item of damage the claimant sustained by reason thereof and the same is a proper charge against the State and judgment should be awarded claimant therefor.

V

Claim 37 — Item B

By reason of the aforesaid acts of the State officers, the claimant's concrete work at lock and dam 6 was made more expensive than it otherwise would have been had the dam been maintained in proper condition, by reason of his being deprived of the means of transporting gravel and sand to dam and lock 6 for the purpose of manufacturing the concrete to be used therein, such increased cost being \$22,028.25, which is a proper item of damages chargeable against the State and judgment should be awarded claimant therefor.

VI

Claim 37 — Item C

The claimant instituted mandamus proceedings against the State at an expense of \$570. His proceedings were dismissed by the court without costs, upon the ground that he had mistaken his remedy. That court had jurisdiction to award or deny costs in its discretion. Its discretion is not reviewable here. The claim is therefore not chargeable against the State and no judgment is awarded therefor.

VII

Claim 37 — Item D

That by reason of the aforesaid acts of the State in its failure to maintain old High dam and the water in the canal, the claimant was damaged on account of the loss of two boats, set forth in the foregoing findings of fact, of the value of \$1,000, which sum is a proper charge against the State and judgment should be awarded claimant therefor.

VIII

Claim No. 38

Owing to the delays caused by the aforementioned negligence of the State, the claimant was delayed in the completion of his work under the contract from May 1, 1914, to December 1, 1915, on account of which delays claimant was obliged to pay:

Premium on faithful performance bond.....	\$18,398 32
For office help and office rent.....	14,170 00
Rental of telephone.....	135 00

\$32,703 32

which items are a proper charge against the State, and judgment is awarded therefor. The claim for liability insurance paid, \$1,839.81, the item for use of plant from May 1, 1914, to

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October 1, 1914, \$2,461, and use of plant from May 1, 1914, to December 1, 1915, \$17,021.10, totaling \$21,321.91, are disallowed.

IX

Claim No. 40

Claimant excavated 13,810 cubic yards of earth from the lands of the city of Oswego and used the same for making cofferdams at a cost of \$24,029.40, before the lands were appropriated by the State, as shown by findings 60, 61, 62, 63 and 64. In the absence of a finding that the engineer should have appropriated the lands belonging to the city of Oswego on the western bank of the river below the bulkhead gates, the claimant's excavation therein was unauthorized and therefore his claim to pay therefor is not chargeable against the State and he is not entitled to judgment therefor.

X

Claim No. 41

Claimant excavated 4,220 cubic yards of material upon the eastern bank of the river, as shown by findings 65, 66, 67 and 68. It was borrowed from outside the prism excavation for the purpose of backfilling the wall of lock No. 6. The contract price of excavation is \$1.74 per cubic yard, thus amounting to \$7,342.80, which sum is a proper charge against the State and judgment should be awarded claimant therefor.

XI

Claim No. 42

That by reason of the acts of the State in opening the tainter gates at the dam across the mouth of Cayuga lake, as shown by findings 69, 70, 71, 72 and 73, by reason of which claimant's cofferdam at dam 6 was flooded, causing him an expenditure in the amount of \$862.25, which is a proper item of damages chargeable against the State and judgment should be awarded claimant therefor.

XII

Claims Nos. 43 and 45

The excavation by claimant of 86,685 cubic yards below grade and 11,036 cubic yards beyond lines shown by the plans, as set forth in findings of fact LXXIV and LXXV herein were, under the terms of the contract, not chargeable against the State and therefore no judgment is awarded him therefor.

XIII

Claim No. 44

The work performed by claimant in the repair of pipes known as the Washburn and Benson pipes by direction of the engineer, amounting to \$153, as shown in findings of fact LXXI, LXXXII and LXXXIII was work for which the State was not liable and consequently he is not entitled to judgment therefor.

XIV

Claim No. 46

The claim that the State, by reason of its aforementioned acts in delaying claimant in the performance of his work under the contract and in passing the law in 1914 known as the "Compensation Law" necessitating the claimant's paying \$1,699.36 additional insurance, as shown in findings of fact LXXXIV, LXXXV and LXXXVI herein, should be disallowed, for the reason that it does not appear from the evidence whether or not he was benefited by such insurance. If it was beneficial to him he suffered no damages.

XV

Claim No. 47

On November 16, 1914, one of claimant's cofferdams was flooded with water by the negligence of the State officials in opening all of the tainter gates of the Phoenix dam, as shown in finding of fact No. LXXXVII, by reason of which the claimant suffered

damages in the sum of \$7,388.95. The item is a proper charge against the State, but has been already included in my findings of fact, claim 37, item A, and therefore he is not here awarded any separate judgment therefor.

XVI

Claim No. 48

The excavation by claimant of 314 yards of material for the building of a storehouse on the easterly wall of lock 6, amounting to \$481.98, as set forth in finding of fact No. LXXXVIII, is a proper charge against the State and judgment is awarded claimant therefor.

XVII

Claim No. 49

The mistake made by the officers of the State in substituting the zero mark at 659-50 instead of 659-25, causing a loss to the claimant of \$276.66, is a proper charge against the State and judgment should be awarded claimant therefor.

XVIII

Items Nos. 39 and 50 having been withdrawn, they should be disallowed.

XIX

The counterclaim filed by the State herein should be dismissed.

XX

The claims considered herein being unliquidated, no interest is allowed until the entry of judgment thereon.

Attached hereto is an opinion, which may be considered as a part of this report, in so far as it discusses the questions of law involved in the case.

The following is a summary of the amounts allowed and disallowed in each claim.

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SUMMARY

	Allowed	Disallowed
Claim 37, item A	\$112,351 37
Claim 37, Item B	22,028 25
Claim 37, Item C .....	.....	\$570 00
Claim 37, Item D	1,000 00	.....
Claim 38	32,703 32	21,321 91
Claim 40 .....	.....	24,029 40
Claim 41	7,342 80	.....
Claim 42	862 25	.....
Claim 43 .....	.....	150,831 90
Claim 45 .....	.....	15,680 24
Claim 44 .....	.....	153 00
Claim 46 .....	.....	1,699 36
Claim 47 (included in 37A).		
Claim 48	481 98	.....
Claim 49	276 66	.....
	<u>\$177,046 63</u>	<u>\$214,285 81</u>

Let judgment be entered in favor of the claimant, Henry P. Burgard, against the State of New York for the sum of \$177,046.63, and that the other claims considered herein totaling \$214,285.81, be dismissed.

Dated: Buffalo, N. Y., July 26, 1918.

ALBERT HAIGHT,
Official Referee

The opinion submitted in connection with this case by Judge Haight is as follows:

HAIGHT, Official Referee.—The claim filed herein by Henry P. Burgard, the claimant, asks for judgment against the State of \$475,686.41. The items upon which this claim is founded are numerous, and have been considered in much detail. The facts

are so fully set forth in my findings that I do not deem it necessary to here rehearse them, except in so far as it becomes necessary to make clear the reasons for my conclusions. The claimant herein is the assignee of the original contractor, who entered into contract No. 37 with the State to construct the new Barge canal through that portion of the Oswego river embraced in the contract. As such assignee, he steps into the shoes, so to speak, of the original contractor and becomes entitled to all of the rights and privileges of such contractor. In the findings he has been referred to as claimant and as contractor, both terms meaning the same person. I shall, therefore, consider him herein as in effect the original contractor.

This State and the contractor, in entering into the contract, are each deemed to have taken into consideration the site of the contract, with all of its physical structures and conditions, its location and surroundings, its highways and means of approach, and its transportation facilities. From the city of Fulton to the city of Oswego the course of the river is practically north. The Oswego canal was constructed along its eastern bank, part of the way enclosed within the bank and part of the way along the river front. There were three dams across the river with locks at the eastern end of each, creating three pools known as the Battle island dam pool, the Minetto pool, and the old High dam pool, from each of which the canal received its supply water, by which navigation thereon was maintained for the benefit of the public. The contract made between the parties provides for the construction of two new dams with locks, bulkheads and gates, the removal of the three old dams, the excavating of a channel through the bed of the river, thus canalizing the river and doing away with the old canal. All of the old dams mentioned were constructed by the State, by the engineering department thereof, for the purpose of creating pools that would feed the canal as it passed from one level to another level, thus facilitating navigation, the operation of which was under the jurisdiction and control of the Superintendent of Public Works. It thus became the duty of the engineering department and the Superintendent of Public Works, acting in

their respective spheres, to construct and keep in repair the canal and its feeders, and to maintain and operate the same for the purposes of navigation by the public during the open season of the year. The State, therefore, in entering into the contract, carefully inserted a clause therein requiring the contractor to so perform his work of constructing the dams and locks and dredging the channel in the river as not to interfere with the maintenance of navigation upon the canal until the work had progressed to such a point that navigation could be turned into the new pools and the new channels created by the contractor, at which time the old dams were required to be removed.

The contractor in entering into the contract upon his part is presumed to have taken into consideration the entire site with its accessibility and the means available for the transporting of his machinery, tools and supplies, together with the duties and powers of the State officials with reference to the maintaining of navigation and the mode and manner in which he could perform the provisions of the contract.

The contractor, pursuant to the provisions of the contract, had entered upon the performance thereof; he had formulated his plans for doing the work in accord with the provisions of the contract; he had acquired and placed upon the site of the contract the necessary dredges, scows, tools and supplies, and during the year 1911 had practically dredged out the channel in the Battle island pool, the land cut-off connected therewith, had acquired a bank of sand and gravel near Fulton, and had engaged in transporting it through the canal to the Oswego dam, known as lock and dam No. 6, which under the contract was to be constructed of concrete, and was prepared to proceed with the construction of that dam early in the spring of 1912, when the old High dam suddenly gave away and was washed out, thus destroying the pool created by it and depriving the canal of water upon which navigation could be maintained.

The major question to be determined in this case is as to whether the State can be held liable for the damages which the contractor may have sustained by reason of the washing out of the dam and

the destruction of the pool and the depriving him of navigable water. It may be that individual shippers and navigators on the canal cannot maintain actions against the State for accidents that occur to the canal by which navigation is temporarily suspended. That question I do not now propose to decide, for I entertain the view that the situation of the contractor was different from that of the public or an ordinary shipper or navigator of the canal. The contractor had undertaken to perform a great and an expensive work requiring costly machinery and numerous employees in order to complete the same. He had been required to furnish a faithful performance bond to an amount of nearly a quarter of a million of dollars, and had subjected himself to a forfeit of \$100 per day for every day elapsing after the final day fixed for the completion of the work under the contract. It consequently became the duty of the State to fully perform on its part and through its officers afford the contractor every facility requisite for his performance. Did the State officers fully perform their duty in that regard? That becomes what I regard as the vital question of fact. In my findings I have set forth the correspondence that took place between the State officers in 1911 and 1912 before and after the washing out of the dam, in which it appears that in the spring of 1911 a large hole appears to have washed out of the abutment; the end of the dam annexed thereto had sunken down; the apron of the dam below had washed away and timbers underneath could be seen, and a large crack had appeared in the dam. After this condition had been made known through the engineers themselves, repairs were finally made to the bulkhead, but the dam itself was left unrepaired. The washing away of the apron, the appearance of wooden logs or beams underneath the dam, the crack and the settling were pretty significant features apparent at that time indicating that the foundation rested upon something other than rock — either piles or cribs, and that piles or cribs forming the foundation were liable to give away. In the spring of 1912 after the dam finally gave away a number of other letters from the Superintendent of Public Works and the engineering department of the State were written with

reference to the cost of restoring the dam and the advisability of doing so, which are fully set forth in my findings, which resulted in their giving up the restoration of the dam. After a careful consideration of the foregoing facts, which are more particularly set forth in my findings, I reached the conclusion that I should find as facts that old High dam was in an unsafe and defective condition in the fall of 1911, and such condition was known to the officers, servants and employees of the State of New York, and yet they neglected to repair the same; that on April 1, 1912, a portion of old High dam, about 136 feet in length, on the west end thereof adjoining the abutment, was washed out on account of its defective and unsafe condition; that at the time that the old High dam was washed out, it was under the control and management of the officers of the State, whose duties were to maintain it until the same could be removed by the claimant pursuant to the terms of his contract; that at that time the work of the claimant in the construction of the new dam at Oswego and the new dam at Minetto had not progressed far enough so that the old High dam could be removed by him and navigation of the existing canal maintained, upon which I have founded my conclusion of law that the washout was without fault of the claimant and that for any damage he suffered therefrom the State is liable.

In reaching the above conclusion it is not my desire to criticize the action of the State officers. They doubtless were desirous of economizing and saving the State as much expense as possible, entertaining the hope that the dam would hold out until the contractor could complete the new dam and thus preserve the navigation of the canal. I only go to the extent of holding that their judgment with reference to the economizing of the expense of repairing the dam and with reference to the hope that it would hold out was erroneous and amounted to legal negligence from which the claimant suffered damages.

CLAIM 37 — ITEM A

Prior to the washing out of old High dam the claimant had formulated a plan for the performance of his work under the con-

tract. It was in substance to dredge the Fulton pool above Battle island dam in the season of 1911, and also to excavate such earth as could be made in the dry in the cut-off below Battle island dam; also to install a dredge at Oswego below lock and dam 6 and dredge out the earth excavation in that pool, and then to commence the work upon lock and dam 6 as early as possible in the season of 1912 and to complete the same by the fall of 1913. He also planned that lock and dam No. 5 at Minetto should be constructed during the same season and that during the spring of 1913 the channel between High dam and lock and dam 5 at Minetto could be dredged, and then that the old dam could be removed and the contract completed by the 1st day of May, 1914. He had also procured and had available the necessary dredges and machinery with which to carry out his plan of doing the work.

Under the provisions of the contract, plans and specification there was work to be done in the pool created by old High dam between station 983 and 1034, which consisted in dredging 94,484 cubic yards of loose material and 55,491 cubic yards of rock, making a total of 149,975 cubic yards, which under the plan formulated by the claimant, the work was to be performed in the wet by means of a rockbreaker and a large dredge and the material removed placed upon scows and floated to the place designated for spoiling, but after old High dam was washed out the rockbreaker and dredge could no longer be floated in the pool and consequently the excavation in the wet was no longer practical, and therefore the claimant concluded to make the excavation in the dry. This necessitated the construction of cofferdams to prevent the water running over the channel designated upon the plans for excavation, the drilling and blasting of the rock within the channel, the installing of a steam shovel for excavating the material, engines, cars and railroad tracks with which the material dumped from the shovel could be conveyed to the spoil banks and discharged. This necessitated the establishing of a new spoil area, it no longer being feasible to construct railroad track over the deep water places in the river where the spoil originally was designed to be floated and dumped and such new spoil area was designated

by the State officials so that the claimant could perform his work by the dry method. Thereupon the claimant proceeded to acquire and install new machinery and plant necessary for doing the work in the dry, erected the necessary cofferdams and made the excavation required at an expense of \$241,682.37.

The claim now presented is that the expense necessarily incurred by him in doing the work in the dry was much larger than it would have been had he been able to do it in the wet by means of the dredge and rockbreaker, and as a measure of damages he claims that he is entitled to the difference between what it actually cost and what it would have cost had it been done by the method originally contemplated.

As to the item, \$241,682.37, expended by the claimant in doing the work in the dry no question arises for consideration here, as I understand it is practically conceded by the State; the items of the expenditure were examined by the engineer acting for the State, who raised a question with reference to one small item and suggested that it included the claimant's item of damages, No. 47, which was for expenses incurred by reason of opening the tainter gates of the Phoenix dam and flooding the claimant's cofferdams and stopping his work and necessitating the repairs of cofferdams and of restoring the works to their former condition, which amount he originally claimed was \$13,388.64. Thereupon the claimant reduced his claim No. 47 to \$7,388.95 and conceded that that amount was included in the item expended by him in performing the work in the dry. The controversy is consequently shifted to the question as to what it would have cost to have performed the work by the wet method. This question was attempted to be established by the opinion of expert witnesses. On behalf of the claimant one expert fixed the cost at \$52,000; another at \$36,500; another at \$55,172, and another at \$53,425. On behalf of the State one fixed the amount at \$165,649.45; another at \$155,031.51 using a drill boat, and by using a rockbreaker at \$167,627.61, while Joseph Ripley, the concluding witness on behalf of the State, fixed the cost at \$172,653 by use of the drill boat, and \$163,781 by using the rockbreaker. I have been much impressed

with the testimony of Mr. Ripley, for concededly he has had a large experience as an engineer, has been consulted upon many of the important works of the country, including that of constructing the Panama canal, and as a consulting engineer in the construction of the Barge canal, he in his opinion concluded that the rockbreaker method proposed by the claimant was cheaper than that of the drill boat in the sum of about \$9,000, and in view of the fact that the claimant was under obligation to the State of using the most approved means of removing the rock, I have concluded to accept the conclusion of Mr. Ripley that the rockbreaker rather than the drill boat is the most effective way of breaking up the rock. Subsequently and upon the examination, Mr. Ripley made a correction of his testimony in which he finally fixed the cost of doing the work with the dredge and rockbreaker at \$159,331. It will thus be observed that the expert witnesses are upwards of \$100,000 apart, and leave me in an unsatisfactory position in arriving at the cost of the work. The attorneys for the claimant and the State doubtless recognizing the position in which the referee is left have resorted to other arguments which might be adopted, in the way of compromising the difference that exists among the experts. I, consequently, on behalf of the claimant, had my attention called to the number of cubic yards of earth excavated by the dredge in the Battle island pool during the year 1911. On behalf of the State, the Deputy Attorney-General suggests that in that pool was all soft material and nothing to prevent the dredge from making a record in its excavation, and suggests a comparison instead with the work done below dam and lock 6 wherein earth and rock were excavated, as he claims, of a similar character to that embraced in the pool of the old dam.

In view of the various theories of the engineers and the suggestion of counsel in the way of compromise, I have concluded to indulge in some reflections upon my own account. In the first place, I find included in the item of expenditures for doing the work in the dry the sum of \$76,573.37 as the cost of the construction and removal of the cofferdams necessary to protect the channel that was to be excavated between stations 983 and 1034. No

question is raised with reference to this item of expenditure. It was made necessary in order to do the work in the dry and would not have been necessary had it been done in the wet by means of the dredge and rockbreaker. Adding to that sum that of \$7,388.95, the amount expended for repairing the cofferdams and restoring the channel made necessary by the flood caused by the opening of the gates of the Phoenix dam, which amount also remains uncontroverted, I have the sum of \$93,962.32, which would not have been expended had the work been done as originally contemplated in the wet, for then no flood from the Phoenix gates would have interfered with the dredge or the rockbreaker and there would have been no cofferdams to repair or water to pump from the prism that was being excavated. Coming then to the excavation of the earth and rock in the prism we have a steam shovel equal in power and capacity to that of the dredge and an opportunity to drill and blast the rock in the dry where the operator can see the rock and so place his drills as to be most effective. He can also see the earth and the rock that is to be excavated and direct the dipper to the point where it will be most effective in the performance of the work. I cannot, therefore, conclude that such part of the work was more expensive. However, when you come to the laying of railroad track, the dumping of the dipper of the shovel upon cars, the transporting of the cars to the spoil bank for dumping, doubtless more laborers would be required than would be necessary to tow the scows in which the dredge had dumped the material from the channel to the place where the material was to be dumped in the river. Another item of additional expense apparently would be the necessity of acquiring an additional plant, steam shovels, engines, cars and railroad tracks and tools. The cost of such plant, I am told by claimant's Exhibit No. 34, to have been \$23,813.15, and also by Exhibit 35 the cost of the plant purchased for rock and dam excavation, but used later on prism excavation, was \$28,981.36. Of this latter the claimant appears to have charged one-half of it to prism excavation, making the total value of the machinery and plant used in the excavation in the dry

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\$38,303.84, while the value of the plant designed for dredging in the wet was \$62,000. The claimant had itemized his expenditure in doing the work in the dry as follows:

Cofferdams and removal.....	\$76,573 37
Liability insurance	8,645 22
Plant depreciation and interest	9,232 15
Supplies	30,760 38
Labor	116,471 25
Total	<u>\$241,682 37</u>

Deducting the amounts—cofferdams, \$76,573.37, and the amount of expenses incurred by reason of the flooding out, \$7,388.95, making a total of \$83,962.32, from the \$241,682.37, we have left the sum of \$157,720.05, with which to do the remaining part of the work in the prism of the canal. Of that sum there is the item of liability insurance, \$8,645.22; the item, depreciation, or use of the plant, \$9,232.15, and the item of supplies, \$30,760.35, totaling \$48,637.72, which would doubtless be approximately the same in doing the work in the wet. As to the item of labor it would doubtless be less by the use of the dredge and rockbreaker. Of course, if the work had been done in the wet, the machinery purchased as shown by claimant's Exhibit 34, would not have been necessary.

There were some other considerations about which there was some difference in views. Samples of the rock that had been excavated from the channel were brought before me. The experts of the claimant thought they were argillaceous sand stone. The State Geologist, on the other hand, on behalf of the State, testified that they were ferruginous sand stone. The difference between the two kinds of stone is that the binding property of the argillaceous is clay, and that of the ferruginous is iron. I have not in my findings deemed it necessary to name the stone, although I incline to the opinion that the views of the State Geologist were

correct. The only importance of ascertaining the character of the stone is in determining how much of it could be removed by the dredge without breaking up. Of the two exhibits that were presented to me, one would somewhat easily split into thin plates, while the other was harder, compact and not easily split. I have, therefore, found as a fact that the upper layers of the rock could be removed by the dredge, but that the lower and denser parts could only be removed after being broken up either by the rock-breaker or by blasting.

Again my attention is called to the fact that claimant's Standard Marion 21½-yard dipper dredge, with which he contemplated dredging the earth and rock between stations 983 and 1034 was up in the pool created by the Battle island dam and that it was too wide to be floated through the canal to the pool created by the old dam. Various theories were advanced in reference to the manner in which it could be removed from the upper to the lower pool; one was that the machinery could be removed and the hull floated over the upper dams; another was that it could be cut in two and floated down and then put together again. The State has insisted that it would be necessary to construct a new hull at the lower pool in order to make use of it. I doubt the feasibility of attempting to float it over the dams. It would have to be done when there was a heavy flow of water in the river. Below the Minetto dam there was a bridge crossing the river with piers against which the hull might strike. In any event it probably would fill with water and possibly sink in one of the lower pools. I, however, know of no reason why it may not be cut in two and thus floated down the canal and then put together again. The State claims that the new hull would cost \$8,000. The claimant thinks that it could be removed to the lower pool for \$2,500. In my findings I have fixed the sum at \$5,000.

In view of all of the circumstances disclosed by the evidence and the argument I have reached the conclusion that the estimate made by the witness, Ripley, is based upon valuations that are too high in a number of particulars, especially in the removal of the dredge, the construction of two scows, the quantity of rock to

be broken up, the time required to do the work, and in the amount of labor to be employed. I, therefore, have concluded to reduce the same in the amount of \$30,000, leaving the amount of \$129,331 as the cost of the construction of that part of the work embraced in the hypothetical question upon which he based his estimate. Deducting that sum from the item, \$157,720.05, the amount expended by the claimant in excavating the channel, leaves a balance of \$28,389.05, which is the amount of greater expense incurred by the claimant in having to do the excavation in the dry, and therefore becomes a proper item of damages herein, which added to the item cofferdams \$76,573.37, and the item damages for flooding out \$7,388.95, makes a total of \$112,351.37, which amount I have forwarded as damages in this case.

In concluding the discussion upon this subject, I perhaps should state that I have not overlooked the suggestion of the Attorney-General made in his brief to the effect that the claimant could have saved a large amount of expense both to himself and the State had he postponed the excavation of the channel of the river between stations 983 and 1034 until he had completed dam and lock 6; that then he could have made the excavation in the wet by the dredge and rockbreaker. Possibly this could have been done, but in view of the fact that the dam and lock were not completed until January, 1915, the excavation of the river channel would necessarily have been postponed until the spring of that year and the closing up of the work under contract prolonged still another year. No suggestion appears from the evidence to have been made by any of the State officers to the effect that he could delay the excavation of the channel of the river until the dam was completed. After the old dam had been washed out apparently the sole question that occupied the minds of the State officers and that of the contractor was as to whether the dam should be restored or whether the excavation should be made in the dry. After the State officers concluded not to undertake the repair of the dam then they readily approved of the plan of the claimant to do the work in the dry.

CLAIM 37 — ITEM B

Under the provisions of the contract, the plans and specifications, lock and dam 6 were to be constructed of concrete and in order to make such construction it was necessary to procure at the site of such construction approximately 50,000 cubic yards of sand and gravel. The most available and economical supply of such sand and gravel to be used in making the concrete was located at Indian point near Fulton on the west side of the Oswego river north of Grass island. The bank was so located that it could be shoveled into boats, the boats floated across the river and enter the canal and thus floated down to the site of the dam.

The claimant and his assignor, in entering upon the contract and in accepting the assignment thereof, relied upon the means of transportation stated.

After High dam was washed out the claimant was unable to transport the sand and gravel to the site of dam 6 by reason of the failure of water in the pool above, and he was therefore compelled to construct a railroad track from lock and dam 6 to lock 12 of the old canal, approximately four miles in length, and to equip the same with engines and cars, and in that way to transport the sand and gravel from its bank to the place where it was to be used in making the concrete for lock and dam 6. The additional cost to the claimant of transporting the sand and gravel amounted to \$22,028.25.

I do not understand that the State controverts the accuracy of the figures given by the claimant with reference to this item. The State, however, does contend that at the time the Superintendent of Public Works gave the claimant permit to construct a railroad track along the tow path of the canal, it was stipulated therein that the construction should be at his own cost and expense, and further that no damages can be recovered by a navigator of the canal. The provisions of the statute upon the subject, section 47, article 4, chapter 13 of the Laws of 1909, being the Canal Law, provides as follows: "There shall be allowed and paid to every person sustaining damage from the canals or from their use or management * * * the amount of such damages to be ascer-

tained and determined by proper actions or proceedings before the Court of Claims * * * provided that the provisions of this section *shall not extend to claims arising from the navigation of the canal.*"

The contention being that the claimant in transporting sand and gravel through the canal to lock and dam 6 became a navigator of the canal and therefore is brought within the concluding provisions of the statute, in which the Court of Claims is not given jurisdiction to award him damages. The provision limiting the jurisdiction of the Court of Claims, it is understood, has reference to injuries or damages incurred in the navigation of the canal, which under a decision of the Supreme Court of the United States is brought within the exclusive jurisdiction of admiralty, thus ousting the State courts of jurisdiction. *Robert v. Parsons*, 191 U. S. 17. The contractor's claim in this instance is not for damages suffered in the navigation of the canal, but it is for damages suffered by reason of the going out of the old dam which supplied the canal with water upon which navigation could be made. It consequently does not appear to me to be brought under the jurisdiction of admiralty, but under the first provision of the statute, which is: "There shall be allowed and paid to every person sustaining damage from the canals or *from their use or management.*"

As to the stipulation occurring in the permit that was granted by the Superintendent of Public Works for the claimant to construct a railroad along the tow path of the canal for the purpose of facilitating his work under the contract, it appears to me that the intent was that he should pay the expenses of constructing the road, etc., but did not intend to cover the items of damage which he suffered by reason of the going out of the dam. I consequently have reached the conclusion that this item of damages should be allowed.

Item C has been disallowed and no discussion of it is deemed necessary.

Item D was for loss of the two canal boats valued at \$1,000, which were stranded in the prism of the canal when the dam was washed out. The amount is not disputed and the question raised

with reference thereto is as to the liability of the State, which is covered by my discussion of that question in our former point.

CLAIM 38

The claimant now asks for damages by reason of the delays caused by the washing out of the dam. He could have completed the contract on or before May 1, 1914, had he not been delayed by the washing out of old High dam. By reason of such delays he was not able to complete the contract until the 1st day of December, 1915, thus prolonging the work under the contract for nineteen months. During this time he was compelled to pay the premium on his faithful performance bond at the rate of \$11,-619.99 per year, making a total of \$18,398.32. He also was compelled to maintain his overhead expenses consisting of rent of office and office help during that period, amounting to \$14,170; also telephone rental, \$135, making a total of \$32,703.32.

Claims for liability insurance premium and use of plant in the performance of work under the contract are disallowed.

The procuring of liability insurance was voluntary on the part of the claimant and not compulsory, and he cannot make the State liable for that which it has not authorized or required.

Liability insurance, however, has been considered and allowed in the ascertaining of the difference in cost to the contractor, if any, for doing the work in the dry instead of in the wet as originally contemplated, which has already been considered in a former point herein. Such insurance may also be considered with reference to work done outside of or in addition to the contract, where the amount to be paid therefor is to be determined upon the principle of *quantum meruit*, but in the work performed under a contract in which the unit price is fixed for each kind of work to be performed or material furnished, the contractor in tendering his bid is presumed to have taken into consideration the question of his personal liability and the amount of premium he would be required to pay to relieve himself of such liability and then reimburse himself out of the unit price paid by him for the work performed. In this case it is said to have been 4 per cent

upon the pay roll of the laborers. Take, for instance, the item of excavation or dredging of the material from the channel in the river; the unit price was one dollar and seventy-four cents per cubic yard. The excavation and the dredging were performed by laborers in the use of the claimant's plant provided for that purpose, so that the labor performed and the use of the plant is included in and paid for by the unit price of pay per cubic yard. The 4 per cent on the pay roll of the laborers also of necessity was included in and paid by such unit price and so on with reference to all of the labor performed under the contract with reference to constructing of dams, abutments, bulkheads and locks, all of which were fixed by the unit price paid for the work performed and including the amount of premium, if any, paid upon the pay roll. It would thus appear that in all of the work performed down to the final end of the contract, the insurance liability of the claimant was included in and paid him by the unit price under the final estimate.

As to the use of plants, they too have been taken into consideration and allowance made therefor in determining the item of damages and were also included in the item prices paid for work done under the contract. The fact that the work was done during the year 1914-1915 has made no difference in the payments that have been made for the work performed under the provisions of the contract. In this case it appears that the contractor has already earned and been paid upwards of \$2,500,000 under this contract for the use of his plant and the work done with it and there remained a very considerable salvage as shown by claimant's Exhibits 34 and 35.

Ordinarily a contractor cannot recover damages or be reimbursed for overhead expenses and performance bond premiums paid for the reason that he is deemed to have taken into consideration the amount of overhead he will be required to maintain and the amount of performance bond premium he will be compelled to pay, in making his bid for the awarding of the contract. Presumably he made his bid sufficiently large to cover such expenses, but after the time limit specified in his contract has expired before

the completion of the work and the delay was caused solely on account of the default of the State, its officers, agents and servants, then the overhead which the contractor is obliged to maintain thereafter and the new premium on performance bond which he is thereafter compelled to pay may be awarded as damages for delay caused by the State. If, however, the delay is caused by reason of alteration orders which the claimant by subsequent agreement has agreed to perform, in which the work of the contractor is materially enlarged, requiring more time for performance, and he is allowed an increase in the compensation to be made therefor, the time for performing the work under the contract will be deemed to be extended for such reasonable time as may be necessary to complete the same. This question was considered by me in the case of Luddington v. State, in which the alteration orders increased the compensation of the contractor in an amount approximately of \$500,000, in which case overhead expenses and bond premiums were disallowed.

Under another claim it is contended that under the Compensation Act of 1914 the insurance provided for by that act may be considered compulsory and included with the faithful performance bond as a part of the overhead expenses. I do not so construe the statute. The contractor may still show the commission appointed under the statute that he is financially able to assume and pay any claim that may occur and therefore avoid the expense of insurance and it is not apparent that a different rule should obtain from that above stated.

There are a number of alteration orders in this case, but all involving small amounts. The last one was dated December 8, 1914, and consequently had to be performed after the time limit in the contract had expired. It, however, only embraced the putting of additional concrete upon the wall of the Varick lock and the expense incurred was \$250. It has not been claimed by counsel that either of these orders materially changed the situation of the parties with reference to the time of performance. I have, therefore, allowed the overhead expenses and performance bond premium for the delayed period of time.

CLAIM NO. 40

The bulkheads and gates of dam 6, according to the plans and specifications and as constructed, extended to the bank on the western end of the dam and consisted of twelve gates. In front of the gates and about twenty feet downstream therefrom there extended a strip of land from the bank out into the river, opposite most of the gates. It was a slope running up from the apron of the dam ten or twelve feet high and belonged to the city of Oswego. The State had appropriated the lands upon the bank abutting upon the bulkhead and gates, but had not appropriated the point of land below the gates belonging to the city of Oswego. The claimant requested the State Engineer and Canal Board to appropriate the point of land belonging to the city of Oswego so that he could excavate the same and thus provide a tail race for the water flowing through the gates and thus control the flow of water in the river and enable him to close the space left open in the dam which had theretofore taken care of the flow of water therein. The State Engineer and Surveyor had the authority to appropriate the land owned by the city of Oswego, if in his judgment he deemed it necessary, and the Canal Board had power to approve of such appropriation. The State Engineer, however, did not deem it necessary to appropriate the same and neglected to do so. After the neglect or refusal of the State Engineer to appropriate the lands mentioned, the claimant entered thereon and excavated 14,520 cubic yards of such land in front of the bulkhead gates, 720 cubic yards of which were used by him on a road which he was constructing along the bank of the river, but which was not involved in any pending claim in this case, and the remainder, 13,800 cubic yards, was utilized by him in making cofferdams.

The fact that the land sought to be excavated was twenty feet down stream from the gates and therefore that space was available as a tail race of sufficient capacity presented a fair question for the engineer to pass upon in determining the question of the necessity for appropriating the land in order to enlarge the tail race. That question he has presumably determined

against the claimant by his refusal to appropriate the land. Under these circumstances I am unwilling to override the decision of the engineer and find that the appropriation was necessary. This conclusion results in leaving the land outside of that embraced in the contract belonging to another party and consequently the entry of the claimant thereon and excavating the material for his use in construction of cofferdams was unauthorized and consequently no recovery of damages can be awarded therefor.

CLAIM No. 41

In claim No. 41 the facts are fully set forth in the findings, and I have reduced the claim in the amount of the items objected to by the State. I consequently do not deem any further discussion thereof necessary.

CLAIM No. 42

In claim No. 42 a further discussion thereof I deem unnecessary.

CLAIMS 43 AND 45

These claims consist of the excavation of material below the grade specified by the plans, amounting to 86,685 cubic yards, which at \$1.74 per cubic yard would amount to \$150,831.90, and excavation beyond the lines established by the plans of 11,036 cubic yards of material, 5,116 cubic yards of which were excavated under contract 37 at \$1.74 per cubic yard, making \$8,901.84, and 5,920 cubic yards of which were excavated under alteration order No. 7 at \$1.14½ per cubic yard, amounting to \$6,778.40, making a total of \$15,680.24, which added to the amount excavated below grade would be \$166,512.14. My figures above given with reference to the cost of the amount of excavation below grade differ from those given on behalf of the claimant. I think my figures are correct and are in accordance with those recognized by the engineers on behalf of the State as in accord with their computation.

The engineer made no change in writing of the plans and specifications of the lines or grades established for excavation by reason

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of the occurrence of structures or other local conditions, or for any excavation below or beyond the lines shown upon the plans. The engineer made no order for channeling the rock. The contractor performed no channeling work. The material within the lines and grade constituting the channel has been paid for by the State, but that which was outside of the lines and below the grade has not been paid for. The question thus arises as to whether the claimant is entitled to pay for such excavation outside and below the lines.

My attention has been called to no case in this State in which such excavation below and outside of the lines has been paid for except in such cases as the contract expressly provides for such payment. Upon the argument it was stated that the material for such excavation had been paid for upon Federal contracts, but my attention has not been called to such cases or as to the language of the contract under which such payments are made. My own judgment is that the question must be determined by the contract itself. Upon that subject we have numerous provisions bearing upon the question. They are set forth in the findings as follows:

"The contract, specification 21, provides:

"'Excavation shall be made only to such lines and grades as are shown on the plans as hereinafter specified, or as may be fixed in accordance with the plans and specifications from time to time by the engineer. Where structures occur the lines and grades shown on the plans shall be considered as approximate only and they will be fixed by the State Engineer in writing, as circumstances require, to give a satisfactory structure. * * * No rock or other material shall project inside the established lines of the cross section, and all projections which, in the opinion of the engineer, may cause damage to boats shall be trimmed or broken off as required. If it appears during the progress of the work that flatter slopes than those shown on the drawings or sides of excavation will be advisable, the State Engineer may direct in writing that such material shall be excavated to an amount sufficient to secure stability.'

"Specification 24: 'The volume of all excavated material for

which the contractor will be paid shall be that occupied by it before its removal. The maximum limit of such volume shall not exceed those defined upon the plan or fixed by the engineer as specified in Paragraph 21. The volume shall be determined by measurement taken before and after its removal; excavation will be paid for only once. All cost of rehandling material must be included in the contract price for original excavation. * * * Any excavation below or beyond the lines shown on the plans which may be required in writing by the State Engineer will be paid for at the contract price for excavation, which price shall also include payment or disposition of the material in the spoil banks.'

"Specification 25b: 'The contractor is to so construct his work that the typical prism width and depth will be conformed with as closely as practicable. * * * The engineer may change the limits of excavation if necessary for a proper adjustment to the local conditions, as specified in Paragraph 21.'

"Specification 25i: 'The quantity of excavation for which the contractor will receive payment at the contract price shall be determined by measurement of the area included within lines described as follows: The surface limit shall be natural outline as determined by measurements taken just before dredging is begun. The bottom line shall be the grade line shown upon the plans. The side limits in rock or similar material shall be those shown upon the plans and the side limits in soft material shall be those shown upon the plans for a 1 on 2 slope, except where flatter slopes are ordered as described in Paragraph 25c. No payment will be made for any excavation outside of the lines above described.'"

In this case the contractor met with no local obstructions which rendered a change in the plans necessary. No change was made by the engineer and no channeling was done or ordered to be done. We therefore, in the above provisions, have the express declaration — *First*. "Excavation shall be made only to such lines and grades as are shown on the plans." *Second*. "The volume of all excavated material for which the contractor will be paid shall be that occupied by it before its removal. The maximum limit of

such volume shall not exceed those defined upon the plans." *Third.* "The volume shall be determined by measurement taken before and after its removal." *Fourth.* "The quantity of excavation for which the contractor will receive payment at the contract price shall be determined by measurements of the area included within the lines described as follows: The surface limits shall be the natural outline as determined by measurements taken just before the dredging is done. The bottom line shall be the grade line shown upon the plans. The side limits in rock or similar material shall be those shown upon the plans and the side limits in soft material shall be those shown upon the plans for a 1 on 2 slope." *Fifth.* "No payments will be made for any excavation outside of the lines above described." Further comment appears to me to be unnecessary. The provisions of the contract are too plain to be overcome by argument.

I am aware that it is customary for contractors when drilling in the rock to go a little deeper than the grade in order to make sure that the rock is removed to the grade and to so drill the holes of the side lines as to go a little beyond the limits, so as to prevent the jagged rocks from extending over the line into the prism, but this is for his own advantage and is for the purpose of preventing his having to return and make excavation over again in order to reach the grade and the lines. It was more economical for him when he was drilling to go a little deeper and a little beyond the lines than it would be to have to drill new holes and do other blasting. The claim should be disallowed.

CLAIM No. 44

Upon the site of the contract No. 37 at a point below Battle island dam on the west shore of the river was a water pipe used by Mr. Washburn for supplying the water to his residence, farms and buildings. The contractor was permitted to spoil material in behind the Battle island in the deeper holes and the silt from the material that he spoiled ran around the end of the pipe and stopped the flow of water therein. The assistant engineer in charge orally directed the contractor to raise the end of the pipe

up from the bottom of the river, and pursuant to such directions the contractor did raise the pipe. There was also located near the upper end of the Minetto retaining wall on the west side of the river a pipe which was placed there by Mr. Benson under a permit from the State made after contract No. 37 had been entered into. In removing cofferdams with the dredge the dipper hit against the pipe and it was broken. The assistant engineer in charge under the direction of the resident engineer orally told the contractor that the pipe must be repaired and if the State was responsible it would pay for it. The contractor did repair the pipe. The assistant engineer directed his assistant to place buoys on this pipe previous to the time that the excavation was made, and the buoys were there at the time the pipe was damaged. The value of the claimant's services and the work done upon the Washburn and Benson pipes was \$153. No evidence was produced before me showing any written contract on the part of the State by which it agreed to care for and maintain the pipes in the river. I conclude, therefore, that the placing of the pipes therein by Messrs. Washburn and Benson was pursuant to mere licenses which were subject to their own care and maintenance and that the State did not assume any burden of care and protection. No order of the State Engineer appears to have been in writing. Whether a cause of action could have been maintained by Messrs. Washburn and Benson against the contractor I do not deem it necessary to consider or discuss. I am not convinced that the State was liable to either of them and therefore I have disallowed this claim.

CLAIM No. 46

In the year 1914 the State of New York passed a statute relating to compensation insurance which became effective July 1, 1914. By its terms all employers of labor in hazardous employment were compelled to take out compensation insurance or to satisfy the commission appointed under the provisions of the statute of his financial ability to pay the compensation himself. The work of the claimant under and pursuant to the contract was hazardous according to the terms of the statute. The claim-

ant consequently did take out compensation insurance pursuant to such statute. He paid for such insurance from July 1, 1914, until the completion of the work under the contract, \$4,671.82, the rate being .062868 on the pay roll, approximately $6\frac{1}{4}$ per cent. Prior to the passage of the statute the claimant had taken out liability insurance upon which he paid 4 per cent on the pay roll; that the premium upon liability insurance from July 1, 1914, to the time of the completion of the contract at the rate of 4 per cent amounted to \$2,972.46. The difference between the premium paid upon the liability insurance under the provisions of the statute and that which he had been paying would amount to \$1,699.36. There is some confusion in the figures given as to the exact amount of premiums paid for liability insurance and compensation insurance. In claim No. 38, the liability insurance apparently covered the period of time from May 1, 1914, to December 1, 1915, but however that may be, I am of the opinion that this claim must be rejected for the reasons given in my opinion disposing of claim No. 38, and for the further reason that it does not appear that the compensation insurance was not more favorable and of greater value to claimant than was his liability insurance.

CLAIM No. 47

The other claims presented herein are fully covered by the findings of fact and conclusions of law, and further explanation thereof I do not deem necessary.

Judgment should be awarded in accordance with the findings and conclusions herewith presented.

PUBLIC SERVICE COMMISSION

FIRST DISTRICT

In the Matter of the Hearing on the Motion of the Commission
as to the Location of a Trolley Station on the Queensborough
Bridge over Blackwells Island

Case No. 2268

(Public Service Commission, First District, June 27, 1918)

Changing route to Blackwells island.

The city of New York maintains a ferry service from the borough of Manhattan to Blackwells island for the convenience of persons and for freight purposes. The proposition was made to do away with this ferry and in place thereof to locate a trolley station on the Queensborough bridge over the island at a storehouse now under construction on the island, at which storehouse three large freight elevators and two passenger elevators were to be put in as part of such storehouse. Several trolley companies now operate cars over the bridge. The question involved is as to whether these companies should be required to stop their cars at the trolley station for receiving and discharging passengers after the completion of such station. It having been found that an appropriation by the city would be needed, and such appropriation not being procurable, the proceeding herein was discontinued without prejudice to the reopening of the same or any similar proceeding.

KRACKE, Commissioner.— This proceeding was instituted on motion of the Commission, as a result of an application by the department of charities of the city of New York, to determine whether a trolley station should be located on the Queensborough bridge over Blackwells island immediately adjoining a storehouse under construction on the island by the city of New York acting through the department of charities. The city was constructing three large freight elevators and two passenger elevators in connection with and as part of the storehouse.

The city maintains a ferry service from different points in the borough of Manhattan to Blackwells island for the carriage of

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patients, ambulances, freight and visitors to and from the institutions under the jurisdiction of the department of charities, and for the carriage of prisoners, prison vans, freight and visitors to and from the institutions under the jurisdiction of the department of corrections. The plan of the city was to substitute the route over the bridge to the island by way of the trolley station and storehouse in place of the ferry service. The city planned to construct the trolley station on the bridge at its own expense and the question before the Commission is whether the several trolley companies now operating cars over the bridge should be required and directed to stop their cars at the trolley station for the receipt and discharge of passengers after completion.

The trolley companies at the hearing interposed no objection to stopping the cars at the station. A conference was held and the general plan of the improvement agreed upon. It was proposed to commence the construction of the trolley station so as to have it completed about the time the storehouse and elevators would be complete and ready for operation providing the commission ordered the trolley companies to stop their cars at the station. The hearing in this case was closed on January 16, 1918, and while the general plan for the construction of the trolley station was agreed upon prior to that date the department of plant and structures and the department of charities of the city of New York, under whose joint jurisdiction the proposed improvement was to have been carried into effect, have been unable to secure the necessary funds to carry on the construction work. I have held this matter open since January to permit these departments full opportunity to secure an appropriation from the board of estimate and apportionment of the city of New York, but it now appears that there is very little chance of the appropriation being granted in the near future and I accordingly recommend that this proceeding be discontinued without prejudice to the reopening of the same or to any other proceeding relative to the subject matter hereof.

In the Matter of the Application of AMERICAN RAILWAY EXPRESS COMPANY for the Permission and Approval of the Public Service Commission for the First District, Pursuant to the Provisions of Section 53 of the Public Service Commissions Law, for the Exercise of the Right or Privilege of Conducting, as Agent for the Director-General of Railroads of the United States Railroad Administration, a General Express Transportation Business, Interstate and Intrastate, upon all Lines of Railroad under Federal Control and Otherwise, Within the First District of the State of New York

Case No. 2304

(Public Service Commission, First District, June 29, 1918)

Application of a corporation as agent for the Director-General of Railroads of the United States Railroad Administration for leave to conduct a general express transportation business upon all lines of railroad within the First District.

The American Railway Express Company was incorporated on June 22, 1918, its object being to solidify, unite and conduct interstate and intrastate express business as agent of the Director-General of Railroads and as auxiliary of the National Railroad Association. As such auxiliary the company has applied to this Commission for permission to exercise its franchises and to do business within the city and State of New York. *Held*, that the granting of such permission depends upon determination whether the exercise of the rights and privileges of the corporation is necessary or convenient for the public service. Also *held*, that there can be little doubt that at least during this period of Federal control over railroad operations the public convenience and interest will be served by a unified control of the express business of the country and by its operation in direct conjunction with the railroads and that the exercise by the said company of the right and privilege of carrying on this business within the State is necessary and will be convenient for the public service. The American Railway Express Company is a Federal instrumentality and agency for carrying on a very important phase of interstate and intrastate transportation. Application granted with the understanding that proposed increases of rates will be filed as soon as printed.

HUBBELL, Commissioner.—The American Railway Express Company, a corporation newly formed under the laws of the

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State of Delaware at the instance of the United States Railroad Administration, applies to this Commission, under section 53 of the Public Service Commissions Law, for a certificate of permission and approval for the exercise of its franchises and the privilege of doing business as an express company within the city and State of New York. An express company is a "common carrier," within the meaning of the Public Service Commissions Law, when "the same is operated wholly or in part upon or in connection with a railroad or street railroad." Pub. Serv. Comm. Law, § 2, subd. 9. The granting of such permission, precedently to the company's doing business as such a common carrier within the State, depends upon determination whether the exercise of such rights and privileges is "necessary or convenient for the public service."

The new company has been formed within the past few days, as the petition states, "for the purpose of acting as agent for the Director-General of Railroads in the conduct of a general express transportation business, interstate and state, upon all lines of railroad under Federal control, and upon other lines, including those between points within the State of New York."

The principal purposes of the incorporation of the petitioner are thus set forth in its Delaware charter:

"Third: The nature of the business and the objects and purposes proposed to be transacted, promoted and carried on, are as follows:

"to engage in and carry on in the State of Delaware, and in and between any and all of the States, Territories and possessions of the United States and the District of Columbia, and in adjacent foreign countries, the business of carrying and transporting and forwarding by railroads, steamboats, ships, canals, stages and other means of transportation, goods, wares, merchandise, money, bills, notes, bullion, packages, parcels and movable valuables of any description, over and upon such lines and routes as it may from time to time establish, and in and between the points, places or stations at which it may from time to time establish and continue agencies; and the said corporation is hereby invested

with the powers necessary and proper for said purpose, as well as the powers incident and appropriate to the express carriers, and especially with full power to give such security in the nature of a general transportation bond as may be required by the laws of the United States and the regulations passed in relation thereto for the transportation and delivery of dutiable merchandise and other property in bond, from port to port in the United States, or through the United States."

The American Railway Express Company was incorporated on June 22, 1918, with an authorized capital stock of \$40,000,000, of which \$30,000,000 was issued at par for assets of certain express companies acquired by the new company, and \$3,000,000 was issued for cash. All the stock is common stock, and no issuance of bonds or general mortgaging of property is contemplated. It appears that, for the purpose of the better handling of the express business, during the period of Federal control of railroad operation, the new company has been formed to consolidate, unify and conduct interstate and intrastate express business, as agent of the Director-General of Railroads, and as auxiliary of the National Railroad Administration. The Adams Express Company, the American Express Company, the National Express Company, Wells Fargo & Company, and the Southern Express Company, go out of business on June 30, 1918, as express companies engaged in domestic transportation, and both interstate and intrastate business within and throughout the United States is taken over by the unified concern which is the present petitioner. As in the case of Federal assumption of control of railroad properties and operations, the existing express companies will not go out of business as corporate entities, but will withdraw from the express business within the United States. The former companies will continue in existence for all corporate purposes and will conduct, at least for the present, their usual foreign express business, the issuance of travelers' cheques, the transfer of money, and the like.

There can be little doubt that, at least during the period of Federal control over railroad operations, the public convenience

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and interest will be served by a unified control of the express business of the country and by its operation in direct conjunction with the railroads. In view of the fact that the new express company will be the only one using the interstate railroads for the carriage of express matter, there can be no doubt that the exercise by the new company of the right and privilege of carrying on such business within the State is necessary, and will be convenient, for the public service. Pub. Serv. Comm. Law, § 53. In all respects, the new company seems to have placed itself in position to be entitled to favorable action at the hands of the Commission upon the present application.

In view of the fact that by the circumstances and purposes of its incorporation, the new company becomes virtually a Federal instrumentality and agency for carrying on a very important phase of interstate and intrastate transportation, the action of the company in submitting itself to the authority of the State law and policy is both significant and commendable. The action of the Commission thereon may be regarded as likewise typical of this and the other State Commissions to co-operate in every practicable way with the Director-General of Railroads and to permit the necessities of the present patriotic emergency to be adequately and promptly dealt with, without any need for sacrificing fundamentals of the State law and policy with respect to public control of public utilities. Before the new company had in fact been formally incorporated, the requisite papers for the present proceeding had been formally submitted to counsel for the Commission and all arrangements made for the prompt holding of the requisite public hearing. As soon as the formalities of incorporation and organization had been completed, formal application was made to the Commission on June 27, 1918, for the present certificate. On that day, the Commission adopted a resolution for a public hearing on the day following and for the publication of the requisite notices of the hearing. On June 28, 1918, the hearing was had and closed. On the day following (June twenty-ninth), the necessary certificate was granted, and the new company was in lawful position to take over the business of its predecessors on the morrow.

On the subject of the company's rates for express transportation and the increases in express rates recently sanctioned, as to interstate transportation, by the Interstate Commerce Commission, the company announced upon the hearing that it will submit to the action of this Commission tariffs promulgating corresponding increases in interstate rates. These tariffs will be filed as soon as printed. Regarding these proposed increases in freight rates, this Commission received, on June 25, 1918, the following telegram from former Interstate Commerce Commissioner C. A. Prouty, now acting in behalf of the Director-General of Railroads:

"Interstate Commerce Commission has allowed advance of ten per cent in express rates which will immediately be filed by present companies. Director-General assumes that you will permit this advance within your State following your past custom and prefers this course rather than to take action himself. Please reply.

"C. A. PROUTY,

"Director."

To this telegram the following reply was authorized by this Commission:

"This Commission is in receipt of your telegram of June twenty-fifth stating that the Interstate Commerce Commission has allowed an advance of ten per cent in express rates which will be immediately filed by the present companies, and asking that this Commission permit the advance within this State. This Commission has jurisdiction only over intrastate rates within New York City and increases in such rates can be made effective within this State by filing tariffs with the two State Commissions. Under the New York statutes these rates would become effective thirty days after filing unless this Commission should suspend them pending investigation. On behalf of this Commission I assure you that no such suspension or investigation is in contemplation and any necessary special permission will be granted to make State rates uniform with those on which interstate rates go into effect. Commission's Law Department

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is also co-operating with attorneys forming new express company for the Director-General to expedite rights of new company to do business with this State.

"OSCAR S. STRAUS,
*"Chairman, Public Service Commission for the
"First District."*

I recommend that a certificate be granted the American Railway Express Company, pursuant to section 53 of the Public Service Commissions Law, in the form herewith submitted.

In accordance with the foregoing opinion the Commission, on the same date, made the following order:

BY THE COMMISSION.—The American Railway Express Company having filed with this Commission its application, by a petition verified on June 25, 1918, for the permission and approval of this Commission, pursuant to the provisions of section 53 of the Public Service Commissions Law, for the exercise of the right or privilege of conducting, as agent for the Director-General of Railroads of the United States Railroad Administration, a general express transportation business, interstate and intrastate, upon all lines of railroads under federal control and otherwise, within the first district of the State of New York; and a public hearing upon the said application having been duly authorized by the Commission and due notice thereof having been published in two newspapers, as required by the resolution of the Commission, and the said application having been duly heard on such hearing, held on June 28, 1918, Commissioner Charles Bulkley Hubbell presiding, and the company being represented by Branch J. Kerfoot, and William L. Ransom, counsel, attending for the Commission and testimony having been taken; and the Commission having determined after such a hearing, and being of the opinion that the exercise of such right or privilege is necessary and convenient for the public service, it is hereby

Ordered, That the permission and approval of the Public Service Commission for the First District be and the same hereby are granted for the exercise by the American Railway

Express Company as aforesaid of the right or privilege of conducting a general express transportation business within the first district of the State of New York.

BROOKLYN BOROUGH GAS COMPANY, Plaintiff, v. PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT; THE CITY OF NEW YORK; HARRY E. LEWIS, as District Attorney of the County of Kings; MERTON E. LEWIS, as Attorney-General of the State of New York, Defendants

Clerk's File No. 19,133, Year 1916

(The above action was brought in the Supreme Court, New York county, and was referred by the court, by an order to which all of the parties consented, to the Hon. Charles E. Hughes, as referee, to try, hear and determine the same. The opinion and report of the referee were filed July 24, 1918.)

Summary of the facts and conditions upon which the application herein is based.

There is no constitutional right to base rates of public service corporations upon estimated costs of reproduction at a particular time regardless of circumstances.

Proper methods of arriving at the cost of reproduction of properties.

Power of the Commission to require a depreciation reserve admitted and also the propriety of allowing for working capital.

Right of plaintiff to have its plant valued as a "going concern."

Consideration of statutes and of conclusions of the Public Service Commission, First District.

Circumstances shown entitle plaintiff to equitable relief.

The plaintiff, the Brooklyn Borough Gas Company, brought the action herein in the Supreme Court to secure an injunction restraining the enforcement of three distinct statutes of the State of New York and an order of the Public Service Commission, First District. The statutes in question were chapter 736 of the Laws of 1905, prohibiting the plaintiff from charging the city of New York or receiving therefrom for gas sold to the city more than seventy-five cents per 1,000 cubic feet; chapter 125 of the Laws of 1906, prohibiting the plaintiff after the year 1910 from charging private consumers or receiving from them for gas sold in the thirty-second ward of the borough of Brooklyn more than eighty cents per 1,000 cubic feet, or for gas sold in the thirty-first ward

of that borough more than one dollar per 1,000 cubic feet; chapter 604 of the Laws of 1916, amending the statute last above mentioned by reducing the sum chargeable to private consumers to the sum of eighty cents per 1,000 cubic feet anywhere in the borough of Brooklyn. On July 8, 1913, the Public Service Commission, First District, entered an order dated on that day, concurred in by the plaintiff, directing that the maximum price for gas in the thirty-first ward of Brooklyn should be ninety-five cents per 1,000 cubic feet after October 1, 1913. This order was made under the authority of section 72 of the Public Service Commissions Law (Consol. Laws, chap. 48), which provides that the Commission may fix the price of gas or electricity not exceeding that fixed by statute, the price as thus fixed by the Commission to be the maximum price to be charged for gas or electricity for a period to be fixed in the order not exceeding three years, or until the Commission fixes a higher or lower maximum price. The provisions for proceedings in case of the violation of the statutes in question specifically set forth; also object of the present action.

The cost of reproduction in determining the fair value of a plant for rate-making purposes is important, but there is no constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time regardless of circumstances. To base rates upon the plant valuation representing a hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be unfair to the public just as rates based upon an estimated cost of reproduction far lower than the actual *bona fide* and prudent investment because of abnormally low prices would be unfair to the company. A public service corporation is entitled to be reasonably compensated for its service and the actual cost of its operations must always be taken into consideration in determining whether or not it receives a fair compensation above that cost. The rate base must be what is called the "fair value of the property" and that as to this there must be reasonable judgment based on a proper consideration of all relevant facts.

When the value of a plant has been properly determined by the regulating authority and suitable allowance is made for the investment in subsequent additions it is manifestly proper to calculate the fair return upon this basis, at least for a reasonable period. The valuation made by the Commission on January 1, 1914, was fairly and correctly made as of that time, and the interval has been one of unusual circumstances incident to war and of especially high costs, and under these circumstances the official appraisal should not be changed upon a hypothetical estimate of reproduction cost under the present abnormal conditions.

The power of the Commission to require a depreciation reserve is conceded by the plaintiff, and the only question as to such reserve is as to the amount allowed for accrued depreciation. The propriety of an allowance for working capital is agreed upon and the only question as to such capital is as to the amount. Method whereby the Commission's estimate was obtained.

There is an element of value in an assembled and established plant doing business and earning money over one not thus advanced. This element of value is a property right and should be considered in determining the value of property upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.

The statute of 1916 establishing an eighty-cent rate was confiscatory, but the statute itself was effective to establish the statutory maximum which could not be exceeded by the Commission, although it might be inoperative as against the plaintiff during the period that it failed to afford to the plaintiff a fair return. Had the Legislature permitted the Commission to fix a rate in excess of the statutory maximum, if the latter was found to be inadequate, the Commission could have fixed a reasonable rate, but the Legislature has seen fit to refuse jurisdiction to the Commission to exceed the statutory maximum in any case. Under the facts adduced in this case the Commission would have no power to fix a rate higher than the statutory eighty-cent rate, and as a corollary the ninety-five-cent rate is no longer effective. The Legislature having fixed its own rate and denied the power of the Commission to fix a rate higher than this, it necessarily superseded the Commission's rate.

The statute establishing the eighty-cent maximum is valid on its face as an exercise of governmental authority in the establishment of reasonable rates, and is invalid only in so far as it appears that the rate is confiscatory as to a particular complaining party. Subdivisions 1, 2 and 3 of section 1 of chapter 125 of the Act of 1906 have been repealed by the Act of 1916 in so far as the latter constitutes a new legislative rule. The court has no power to fix a reasonable rate, and the Legislature has seen fit to deprive the Commission of power to afford the relief to which the plaintiff here is entitled. As the latter is thus left without adequate remedy, it is entitled to relief in equity from the enforcement of the statutory rate, which has superseded the earlier rates, so long as that rate denies to the plaintiff a fair return for its public service.

This is an action in equity, by the plaintiff gas company against the defendant public authorities, for an injunction restraining the enforcement of the provisions of three statutes of the State of New York and an order of the Public Service Commission of the State of New York.

The plaintiff company is the only concern supplying gas in the thirty-first ward of the borough of Brooklyn, and the statutes and order here in question undertook to fix maximum rates chargeable by the plaintiff company for gas.

The plaintiff company sought in this action to have these statutes and the Commission order held unconstitutional and void,

because confiscatory. The plaintiff sought also to restrain the various public authorities from instituting suits for penalties and forfeitures, or other proceedings to enforce the statutes and order.

The three statutes and the order in question were:

1. Chapter 736 of the Laws of 1905, prohibiting the plaintiff from charging the defendant the city of New York, or receiving therefrom, for gas sold to the municipality, a sum in excess of seventy-five cents per 1,000 cubic feet.

2. Chapter 125 of the Laws of 1906, prohibiting the plaintiff, after the year 1910, from charging private consumers, or receiving from them, for gas sold in the thirty-second ward of the borough of Brooklyn, a sum per 1,000 cubic feet in excess of eighty cents; or for gas sold in the thirty-first ward of the borough of Brooklyn, a sum per 1,000 cubic feet in excess of one dollar.

3. Chapter 604 of the Laws of 1916, amending chapter 125 of the Laws of 1906, prohibiting the plaintiff, after July 1, 1916, from charging private consumers, or receiving from them, for gas sold anywhere in the borough of Brooklyn, a sum per 1,000 cubic feet in excess of eighty cents.

4. An order of the Public Service Commission, dated and entered July 8, 1913, and duly accepted by the plaintiff company on July 14, 1913, and ever since complied with by it, directing that the maximum price to be charged for gas in the thirty-first ward of the borough of Brooklyn by the plaintiff, after October 1, 1913, should be ninety-five cents per 1,000 cubic feet; which order was made pursuant to section 72 of the Public Service Commissions Law (Laws of 1910, chap. 480, as revised and amended, constituting Consol. Laws, chap. 48), which provides that after a hearing and investigation "the commission within lawful limits may, by order, fix the maximum price of gas or electricity *not exceeding that fixed by statute* to be charged by such corporation or person, for the service to be furnished; * * * *The price fixed by the commission under this section or under subdivision five of section sixty-six shall be the maximum price to be charged by such person, corporation or*

municipality for gas or electricity for the service to be furnished within the territory and *for a period to be fixed by the commission in the order*, not exceeding three years except in the case of a sliding scale, and *thereafter until the commission shall*, upon its own motion or upon the complaint of any corporation, person or municipality interested, *fix a higher or lower maximum price of gas or electricity to be thereafter charged*. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon *capital actually expended* and to the *necessity of making reservations out of income for surplus and contingencies*."

Section 66, subdivision 5, of the Public Service Commissions Law, referred to above, reads in part as follows: " * * * Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished *notwithstanding that a higher rate or charge has heretofore been authorized by statute*, and the just and reasonable acts and regulations to be done and observed; * * *."

The order of July 8, 1913, as accepted by the company, has not been vacated, changed or modified, nor, prior to the commencement of this action or the filing of the referee's report, was any application made by the plaintiff to the Commission to modify the order or to fix a higher rate, nor was any tariff or schedule filed, showing a higher or different rate.

For violations of these three laws, the Attorney-General and the district attorney of Kings county were authorized by statute to begin mandamus proceedings and injunction actions, and they

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must, pursuant to section 1962 of the Civil Code, begin penalty actions. For violations of chapter 736 of the Laws of 1905, the city of New York must, under the provisions of that statute, begin penalty actions on account thereof. For violations of any of the three laws or of its own order, the Public Service Commission must begin a mandamus proceeding or injunction action, pursuant to section 74 of the Public Service Commissions Law, and it may likewise begin penalty actions pursuant to sections 73 and 24 of the Public Service Commissions Law.

Ever since this action was begun, the plaintiff company has been, and is now, selling gas at the following rates per 1,000 cubic feet: To the city of New York, at seventy-five cents; to private consumers in the thirty-second ward, at eighty cents; and to private consumers in the thirty-first ward, at ninety-five cents, pursuant to the order of July 8, 1913.

This action was brought to restrain each and all of the defendants from beginning or carrying on any mandamus proceedings, injunction or penalty actions, or any other actions or proceedings, against the plaintiff, for the violation of the three laws or the order, or any of them, to the end that the plaintiff may be left free itself to fix such new rates, both for the city of New York and also for private consumers, above the present alleged statutory maximums of one dollar per 1,000 cubic feet for private consumers and of seventy-five cents per 1,000 cubic feet for the city, as will yield to the plaintiff reasonable compensation for the services rendered.

All the issues in this action were referred by the court, by an order to which all of the parties consented, to the Hon. Charles E. Hughes as referee, to try, hear and determine the same.

Further facts are stated in the opinion of the referee.

Bassett, Thompson & Gilpatric (Edward M. Bassett and Wilson W. Thompson, of counsel), for the plaintiff gas company.

William L. Ransom, attorney and counsel for the defendant Public Service Commission for the First District (William L. Ransom, Godfrey Goldmark and Jacob H. Goetz, of counsel).

William P. Burr, corporation counsel (Lamar Hardy, corporation counsel prior to January 1, 1918), for the defendant the city of New York (S. J. Rosensohn, Arthur L. Goodhart, John P. O'Brien, Judson Hyatt, and Vincent Victory, assistant corporation counsel).

Milo R. Maltbie, city chamberlain of the city of New York, *amicus curiæ*.

Harry E. Lewis, as district attorney of the county of Kings, defendant appearing and defending in person (Ralph E. Hemstreet and Harry G. Anderson, assistant district attorneys, of counsel).

Merton E. Lewis, as Attorney-General of the State of New York, defendant appearing and defending in person (Edgar Bromberger and Samuel A. Berger, Deputy Attorney-Generals, of counsel).

Neile F. Towner, for the Empire State Gas and Electric Association, *amicus curiæ*.

Robert L. Luce, *amicus curiæ*.

CHARLES E. HUGHES, Referee.—The Brooklyn Borough Gas Company supplies gas in the thirty-first ward (embracing Coney Island) and to a small extent in the thirty-second ward of the borough of Brooklyn, city of New York. The company was incorporated in 1898, succeeding the Coney Island Fuel and Gas and Light Company. Until the year 1905, the statutory maximum rate for gas in this territory was one dollar and twenty-five cents per 1,000 cubic feet. Laws of 1890, chap. 566, § 70. In 1905 the maximum rate for gas furnished to the city of New York was fixed at seventy-five cents per 1,000 cubic feet. Laws of 1905, chap. 736. In 1906 the Legislature fixed the maximum

rate for gas supplied to private consumers in the borough of Manhattan, in the borough of Brooklyn (except in the thirtieth and thirty-first wards) and in a certain portion of the boroughs of Queens and The Bronx, city of New York, at eighty cents per 1,000 cubic feet. For the thirtieth ward of Brooklyn the maximum rate of one dollar was established, and for the thirty-first ward the Legislature provided a scale of decreasing maximum rates for private consumers, that is, from one dollar and twenty cents for the year 1907 to one dollar and five cents for the year 1910, and the maximum rate of one dollar was fixed for succeeding years. Laws of 1906, chap. 125.

In the year 1913, after a hearing, the Public Service Commission for the First District ordered that from October 1, 1913, to December 31, 1914, the rate charged by the plaintiff to private consumers should be ninety-five cents per 1,000 cubic feet (4 P. S. C. Rep. 1st Dist. 328); and under section 72 of the Public Service Commissions Law the price fixed by the Commission was to continue to be the maximum price for the stated period and thereafter until the Commission fixed a different maximum price. Since October 1, 1913, the plaintiff has charged private consumers at the rate of ninety-five cents.

By chapter 604 of the Laws of 1916, the Legislature amended chapter 125 of the Laws of 1906 so as to fix the maximum rate of eighty cents throughout the borough of Brooklyn, as well as in Manhattan, for gas supplied to private consumers after July 1, 1916. Thereupon, the plaintiff brought this suit to restrain the enforcement of this eighty-cent rate, alleging that the act of 1916 was confiscatory and void as against the plaintiff and, upon similar grounds, relief was also sought against the following rates: that of seventy-five cents fixed by the act of 1905 for gas supplied to the city of New York, that of ninety-five cents fixed by the Public Service Commission and that of one dollar fixed by the act of 1906.

Aside from questions relating to the valuation of the plaintiff's plant, there is little, if any, controversy as to the facts. The conditions of operation are peculiar because of the fact that the

winter population in the territory served by the plaintiff is much less than that of the summer and because of the enhanced expense of distribution through a district which taken as a whole is still but sparsely settled. With the development of Coney Island, plaintiff's business has rapidly grown. The number of its meters in use has doubled since the year 1910. In that year its gas sales amounted to 213,817,000 cubic feet; in 1916 they amounted to 419,622,400 cubic feet, and in 1917 to 462,964,400 cubic feet.

At the time of its organization in 1898, the plaintiff had a capital stock of \$500,000 and a bonded debt of \$240,000, and it is undisputed that the value of its property in April, 1898, amounted to \$290,000. Its present capital stock amounts to \$750,000 and its total outstanding bonds amount to \$1,000,000, bearing 5 per cent interest.

Fair value of plaintiff's property. Three appraisals have been made by the Public Service Commission for the First District. In October, 1910, the Commission entertained a complaint of consumers that the price of gas should be reduced, and in the course of informal proceedings the corporate history and financial operations of the company were examined. The Commission found that the "minimum present value," that is, for the year 1911, was \$1,135,000. It was concluded that a reduction of the rate below the then statutory maximum of one dollar was not warranted. 2 P. S. C. Rep., 1st Dist., 620, 639.

In March, 1913, there was a further proceeding before the Commission. There was a thorough investigation by its engineers and accountants, with full opportunity to the company and to the consumers to be heard. The examination was facilitated by the company, which announced that it would accept whatever ruling the Commission might make for at least one year from its date. The Commission found that conditions had changed since December 31, 1910, and that the case could not properly be decided without a finding as to the fair value upon which a return should be computed. Accordingly an appraisal of the property was made, with the following result, as of December 31, 1912 (4 P. S. C. Rep., 1st Dist., 328, 345):

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"Reproduction cost	\$1,144,043
Depreciation	189,159
	<hr/>
	\$954,884
Land — present value	107,500
	<hr/>
Present value of physical property	\$1,062,384
Preliminary and development	180,000
Working capital	60,000
	<hr/>
Total	<u>\$1,302,384."</u>

In the above estimate of reproduction cost (\$1,144,043) there were included allowances for "general engineering, supervision, administration, contingencies, incidentals, incomplete inventories, etc." *Id.* pp. 337, 344. But it was said that there are "certain expenses connected with every undertaking which are not represented by physical property, but which must be incurred in order that the plant may become an operating unit — a going concern." An allowance of \$180,000 was made for these under the description of "preliminary and development," as thus explained by the Commission (*Id.* p. 344):

"These relate to the initial promotion of the scheme, the organization of the company, and the securing of franchises and permits. Interest and taxes during the period of construction must be paid, and as there are no earnings they are ordinarily included as a part of the cost of the undertaking. There are also other expenses connected with the experimental or trial operation of machinery and the adjustment of the various parts. Ordinarily, one would expect that the company itself would have data upon which to base an estimate of a reasonable allowance for these items; but the company has produced no records to show what was actually spent, and it is not to be expected that, in the absence of records of actual cost, the Commission will adopt a figure that seems large or unreasonable.

"Following the principles adopted in other cases, it is our

opinion that the sum of \$180,000 is sufficient to cover all preliminary and development expenses, including interest and taxes during construction."

The Commission concluded that "the fair value of the property of the company as of December 31, 1912, certainly does not exceed \$1,300,000." And it was noted (1) that this amount was only \$60,000 less than the maximum which the company could possibly claim as the total original investment, and (2) that it exceeded "by over \$200,000 the result obtained by deducting the accrued depreciation from this maximum plus the appreciation of land." *Id.* p. 345.

The Commission also made allowances on account of certain improvements contemplated for 1913 and 1914 and, with these additions, "computing the depreciation and appreciation for the two years in question, and averaging the fair value at the beginning and end of each year," the Commission finally found that "the fair value of the property upon which the company is entitled to a fair return is \$1,320,000 for 1913 and \$1,400,000 for 1914." *Id.* p. 346.

It was upon this basis that, on July 8, 1913, the rate of ninety-five cents per 1,000 cubic feet was fixed. *Id.* p. 330. The company, while accepting the order fixing the rate, notified the Commission (August 14, 1913) that it did not accept the amount allowed by the Commission for "preliminary and development" (\$180,000); or the amount allowed for "working capital," which it was said should have been \$85,000; or the appreciation of land fixed at \$4,000 for 1913 and 1914, respectively, as a credit to its income account; or the opinion of the Commission that the present value "of the city paving over mains and services" should not be allowed; or the allowances made by the Commission for improvements for the years 1913 and 1914, these allowances, it was said, being too small. The company added that this statement did not include other exceptions that it might find it desirable to file with the Commission. It does not appear that any other exception was filed.

About five months after the order above mentioned, the plaintiff made an application for the approval of the Public Service Commission of the issue of additional shares of capital stock to the amount of \$125,000 in par value. The application was granted in December, 1913, subject to the requirement that none of the proceeds of the stock should be expended save with the approval of the Commission on a showing that the expenditure represented a real increase in fixed capital as defined in the accounting rules of the Commission. Upon the application for the withdrawal of the proceeds of sale, the Commission granted its consent, on March 3, 1914, upon the condition that the company should adjust its fixed capital account in accordance with an attached schedule entitled "Schedule of estimated reproduction cost and accrued depreciation January 1, 1914." This schedule was as follows:

	Estimated réproduction cost	Accrued depreciation
Organization	\$20,000 00	.....
Other intangible capital.....	60,000 00	.....
Land devoted to gas operations....	113,705 79	.....
General structures	9,667 54	\$2,741 89
General equipment	8,455 64	250 00
Furnaces, boilers and accessories..	23,926 71	5,918 48
Steam engines	1,286 00	85 00
Water gas sets and accessories....	56,117 35	10,250 53
Works and station structures.....	76,894 80	11,059 32
Holders	213,160 29	14,080 52
Purification apparatus	31,183 80	3,947 45
Accessory equipment at works.....	71,326 16	10,460 72
Trunk lines and mains.....	537,097 27	88,259 28
Gas services	118,117 71	36,405 16
Gas meters	81,814 25	21,550 82
Gas meter installation	26,548 49	6,084 00
Municipal street lighting fixtures..	5,369 00	1,079 00
Gas engines and appliances.....	2,540 00	2,225 00
Gas tools and implements.....	1,598 48	370 88

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	Estimated reproduction cost	Accrued depreciation
Gas laboratory equipment.....	\$1,007 60	\$297 08
Law expenditures during construction	15,000 00	.....
Taxes during construction	5,000 00	.....
Interest during construction	65,000 00	.....
Miscellaneous construction expenditures.	15,000 00	.....
Total fixed capital.....	<u>\$1,559,816 88</u>	<u>\$215,065 13</u>

The net fixed capital thus shown, after deducting the amount stated as accrued depreciation, was \$1,344,751.75. It will be observed that the first two items in the above schedule for "organization" and "other intangible capital" and the last four items for "law expenditures," "taxes," "interest" and "miscellaneous" expenditures during construction aggregate \$180,000, corresponding to the item "preliminary and development" allowed in the former appraisal. According to the plaintiff's books, on December 31, 1913, its total fixed capital amounted to \$1,897,719.37 and its "accrued amortization of capital" amounted to \$124,539.61, leaving as its "total fixed capital—net investment," according to its report of that date, the sum of \$1,773,179.76. In connection with this book showing, it should be remembered that at the outset of the company's operations, in 1898, it appears that its then fixed capital as represented by its outstanding stock and bonds (\$740,000) was about \$450,000 in excess of the then value of its property. Under the Commission's ruling, the company was required to increase its reserve for depreciation to the amount shown in the Commission's schedule, to wit, \$215,065.13, by transferring the sum of \$90,525.52 from the book surplus. The fixed capital account was to be reduced from \$1,773,179.76 to \$1,344,751.75, the appraised value as found by the Commission after the deduction of depreciation. Of this entire reduction, amounting to \$428,428, the company was

to charge out of surplus at once (including the charge above mentioned) the sum of \$178,428, and the remaining \$250,000 was to be carried in a suspense account and was to be amortized by a special reserve of five cents for each 1,000 cubic feet of gas sold, in addition to the general depreciation reserve. It was explained that this special reserve to amortize the \$250,000 of book capital, in excess of the ascertained value, was not to increase directly or indirectly the price to be charged for gas, but was to come out of the amount allowed to the company as its "fair return" and was thus to be borne by its stockholders. 5 P. S. C. Rep., 1st Dist., 203-209. The Commission stated in its conclusion — after referring to the company's agreement to undertake this revision of its accounts: "So far as the Brooklyn Borough Gas Co. is concerned, the company and the Commission have now agreed upon a detailed inventory and appraisal covering the amount at which every unit of property stands in the capital account. This inventory or appraisal can easily be kept up to date so that an investigation as to the rates or prices charged for gas can be made very expeditiously. The company on its part will be able to present to banking houses and investors a balance sheet virtually approved by the Public Service Commission." *Id.* p. 209.

In the resolution of its board of directors, adopted March 24, 1914, it was stated that the company did not admit the right of the Commission to impose the conditions above mentioned, and that the company's action should not be construed "as an acquiescence in the request of the Commission as a matter of right," but "as a matter of policy," and in the interest of the company the recommendations of the Commission were accepted and the company re-wrote its books accordingly. Its capital account has since been maintained upon the basis thus established, subsequent additions and withdrawals being entered in accordance with the Commission's rules.

Starting with the Commission's appraisal of the plaintiff's property, as of January 1, 1914, the amount of fixed capital, as shown by the plaintiff's books at the end of each year, is as follows:

	Total fixed capital — gross investment	Accrued amortization of capital	Total fixed capital — net investment
Jan. 1, 1914 ...	\$1,559,816 88	\$215,065 13	\$1,344,751 75
Dec. 31, 1914 ...	1,713,998 88	241,549 75	1,472,449 13
Dec. 31, 1915 ...	1,769,740 75	262,893 49	1,506,847 26
Dec. 31, 1916 ...	1,835,650 26	304,794 13	1,530,856 13
Dec. 31, 1917 ...	1,907,871 70	336,943 16	1,570,928 54

The amounts thus set forth as "accrued amortization of capital" may be said, as the plaintiff states, to represent the plaintiff's depreciation fund.

The plaintiff's contentions as to the value of its property are advanced upon two distinct bases, (1) upon the testimony it presents as to cost of reproduction, and (2) upon the above-mentioned fixed capital, in accordance with the Commission's appraisal, with certain additions.

First. It is the contention of the plaintiff that the fair value of its property devoted to its public undertaking, based upon cost of reproduction as of December 31, 1916, is at least \$2,939,634. This estimate embraces the valuation placed upon its land, exclusive of buildings, and the asserted cost of reproduction of its plant.

Land. The estimate of land values, given by the plaintiff's witness, James A. McDonald, is as follows:

West Twelfth street and Coney Island creek.....	\$132,165
West Fifth street and Sheepshead Bay road.....	35,642
Coney Island avenue.....	12,000
Total.	\$179,807

In the rate proceeding already described, the Public Service Commission valued the two parcels, West Twelfth street and West Fifth street, at the total amount of \$107,500 as of December 31, 1912. 4 P. S. C. Rep., 1st Dist., 345. The Commission said: "The original cost of both parcels was approximately \$60,000,

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the new site [West Twelfth street] acquired in 1906 having cost about \$49,000. The value of both parcels upon December 31, 1910, was estimated to be \$98,500, and this figure was accepted by the company's representatives. The company now asks that it be allowed a 10 per cent increase for the two years from 1910 to 1912." Id. p. 342. The Commission found that the annual increase in the value of the parcels for the preceding two years was \$4,500, and thus fixed the total value at \$107,500. In its protest addressed to the Commission under date of August 14, 1913, the company took no exception to this valuation of the land, but did object to the credit to its income account of the sum of \$4,000 for each of the years 1913 and 1914 on account of appreciation of land. This objection to the credit to its income account was well taken (*People ex rel. Kings County Lighting Co. v. Willcox*, 210 N. Y. 479, 495), but this does not affect the valuation of the land. There were certain additions, through grading, to the value thus found, and when the fixed capital account was made up as of January 1, 1914, the "land devoted to gas operations" (consisting of the same two parcels) was valued at \$113,705.79. Of this amount, the West Twelfth street parcel was taken at \$93,095.79, and with further additions through grading this parcel stood on the company's books on December 31, 1916, at \$99,824.37. The West Fifth street property, which was valued on January 1, 1914, at \$20,610 was carried at this amount on the company's books on December 31, 1916. It also appears that the value of the West Twelfth street property was represented by the company to the State Tax Department, as of June 30, 1916, as being \$98,908.38, and apparently the other parcel was then represented as being worth \$20,610. On December 31, 1917, the West Twelfth street property stood on the books at \$103,193, and the West Fifth street property at \$20,627.

The defendant's real estate expert valued the West Twelfth street property at \$91,475 and the West Fifth street parcel at \$15,400. The experts are far apart in their valuations, and I am of the opinion that, upon the evidence, the value of these two parcels (as of December 31, 1917) may fairly be taken to be

the amount shown in the plaintiff's capital account, based upon the Commission's appraisal which was accepted by the company, as already stated, with the additions of the later improvements, that is, \$103,193 for the West Twelfth street property and \$20,627 for the West Fifth street property.

The other parcel included in the appraisal of the plaintiff's expert (but purchased since the Commission's appraisal) was the parcel on Coney Island avenue. It was acquired in 1915 as a site for an office building, the purchase price being \$11,000. The plaintiff's witness valued this parcel at \$12,000 and the defendants' witness at \$7,500. The property is carried on the books of the company at the amount of its actual outlay, that is, \$11,893, and I think that its value may properly be put at this amount.

So far as these parcels are concerned, the evidence would not support a finding of the increased value for which the plaintiff contends.

Plant exclusive of land. The plaintiff's contention on the basis of the cost of reproduction of plant rests exclusively on the estimate of the plaintiff's expert, John D. Shattuck. This estimate was as follows:

Total valuation land excluded.....	\$1,858,453
1 per cent company's fire insurance and employers' liability.	
2 per cent company's general public.	
1½ per cent company's legal expenses, 3½ per cent	65,046
	<hr/>
	\$1,923,499
Working capital, 5 per cent.....	96,175
Land (McDonald appraisal).....	179,807
	<hr/>
	\$2,199,481
5 per cent for financing, discount on bonds and securities	109,924
	<hr/>
	\$2,309,405

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6 per cent interest during construction.	
1/2 per cent taxes during construction, 6 1/2 per cent	150,111
	<hr/>
	\$2,459,516
Observed depreciation	9,821
	<hr/>
	\$2,449,695
20 per cent going value	489,939
	<hr/>
	\$2,939,634
	<hr/>

It will be observed that Mr. Shattuck's estimate includes an allowance for "working capital" of \$96,175 and for "going value" of \$489,939. Before adding these and other percentage items, as stated, his cost of reproduction (new), land excluded, amounted to \$1,858,453. He allowed for "observed depreciation" the sum of \$9,821. While this estimate was made as of December 31, 1916, it is manifest that it is not in fact an estimate of the cost of reproduction as of that date. Mr. Shattuck was of the opinion that in view of the extremely high prices then prevailing, it would not be proper to take the actual cost of reproduction as of that time and for this reason he made an estimate based upon the average cost of various parts of the plant spread over a period of five years ending December 31, 1916. As plaintiff's counsel says, the high cost of material and the scarcity of labor rendered the end of 1916 "a prohibitive time to build public utilities of this sort," and Mr. Shattuck "showed his fairness by adopting a spread-out of five years in obtaining his costs."

While it is important to consider the cost of reproduction in determining the fair value of a plant for rate-making purposes, it cannot be said that there is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time regardless of circumstances. To base rates upon a plant valuation

simply representing a hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be manifestly unfair to the public, and likewise to base rates upon an estimated cost of reproduction far lower than the actual *bona fide* and prudent investment because of abnormally low prices would be unfair to the company. This question of taking the hypothetical reproduction cost under normal conditions as a rate base should, of course, not be confused with the necessity of recognizing actual costs of operation even though abnormal. A public service corporation is entitled to be reasonably compensated for its service and the actual cost of its operations must always be taken into consideration in determining whether or not it receives a fair compensation above that cost. But it is a different thing, after cost has been defrayed and the question is as to the compensation to be allowed in excess of cost, to take as the basis for a compensatory return an asserted plant value, far above the actual investment, which is reached merely by expert estimates of a cost of reproduction under abnormal conditions. This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return not only on actual investment but upon a normal reproduction cost in the view that unless it could make an essentially exorbitant demand upon the public it would be deprived of its property without due process of law. The enforcement of the constitutional guaranty does not require the application of any artificial formula. It has constantly been pointed out that the rate base must be what is called "the fair value of the property" and that as to this there must be a reasonable judgment based on a proper consideration of all relevant facts. *Smyth v. Ames*, 169 U. S. 466, 546, 547; *San Diego Land & Town Co. v. National City*, 174 id. 739, 757; *San Diego Land & Town Co. v. Jasper*, 189 id. 439, 446; *Willcox v. Consolidated Gas Co.*, 212 id. 19, 41; *Minnesota Rate Cases*, 230 id. 352, 434; *People ex rel. Kings County Lighting Co. v. Willcox*, 210 N. Y. 479, 485, 495. As was said by the Court of Appeals in the case last cited: "The cost of reproduction less accrued depreciation rule seems to be the one

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generally employed in rate cases. But it is merely a rule of convenience and must be applied with reason." Mr. Shattuck properly shrank from predicating the validity of rates on a hypothetical cost of reproduction on December 31, 1916, and it is also to be observed that he did not take the cost of reproduction as of any particular time. His endeavor was to get at a basis for rate-making by seeking "a fair reproduction value based on a period of five years" and thus to avoid what he regarded as an abnormal reproduction cost.

If, however, we are not to take the actual cost of reproduction at the present time, or within a year or so, because it would be an abnormal cost, and we are to seek some fairer basis of estimating the value of plaintiff's property for the purpose of determining the validity of rates, it would be difficult to find any basis more just than the appraisal carefully made by public authority and based on reproduction cost before the outbreak of the European war, with proper consideration of the actual investments since that time. Not only was the propriety of the valuation made by the Public Service Commission in the rate proceeding in the year 1913 left unchallenged in any judicial proceeding, but in this action the plaintiff set forth this appraisal in its complaint and has offered it in evidence as proof of the fair value of its property at the time the appraisal was made. The rate then fixed was based upon this valuation and was accepted as such.

The valuation made by the Commission as of January 1, 1914, embraced substantially the same conclusions as to reproduction cost as those reached a few months earlier in the rate proceeding and made allowance for additions to that date. When the value of a plant has been properly determined by the regulating authority, and suitable allowance is made for the investment in subsequent additions, it is manifestly proper to calculate the fair return upon this basis, at least for a reasonable period. In the present case, the interval has been one of unusual circumstances incident to war and of especially high costs, and there is no reason why there should be substituted for the official appraisal a

hypothetical estimate of reproduction cost under abnormal conditions reaching an amount vastly in excess of the actual investment. I conclude that the Commission's appraisal, plus an allowance for investment in subsequent additions as shown by the plaintiff's books, affords in this case a proper basis for calculating the fair return to which the plaintiff is entitled, and if the rates complained of permit a fair return on that basis, the plaintiff would have no ground for contending that it was deprived of its property without due process of law. The testimony of the plaintiff's expert does not, in my judgment, afford a satisfactory basis for finding the fair value of the plaintiff's plant.

On the other hand, the city of New York introduced the testimony of Mr. Alton D. Adams, an engineer and accountant, for the purpose of meeting the testimony of Mr. Shattuck and of showing what is called "the value of the plaintiff's property according to investment outlay." The estimate of Mr. Adams was, in substance, a computation of the cost of production of the plant at the time it was actually produced. It was based upon his examination of the plaintiff's books and upon his information with respect to the cost of other plants and his general experience. His process was to endeavor to set down the original cost of each item as of the time that it was purchased or constructed and then to deduct estimated depreciation of various parts according to age in 1916. He purported to use actual prices paid for materials and equipment by the plaintiff as the basis for computation so far as these were available and, where records of the plaintiff were not available to determine cost, the prices actually paid by other companies for like materials or construction were taken as the basis of prices. Thus, the witness' testimony is an opinion as to original cost calculated by means of various unit prices derived from the plaintiff's records or, when these are absent, from other sources and applied to the portions of the plant deemed to have been constructed at particular times. I do not think it necessary to review the criticisms which have been submitted in argument with respect either to method, assumed unit prices, or quantities. Nor is it necessary to discuss the question as to the weight to be ascribed in a pro-

ceeding of this character to such a hypothetical estimate of original cost. It is sufficient to say that there is manifestly no justification for accepting this estimate of original cost in place of the value as determined by the public authority constituted for that purpose. With respect to the value of the plant as it stood in 1913, the accuracy of the Commission's appraisal is not impugned and there is no reason for discarding it and for following the witness in his endeavor to estimate the cost of the production of the plant in the earlier years. And as to the actual cost of the additions that have been made since the Commission's appraisal, there is no lack of certainty and the witness' estimate furnishes no aid whatever so far as these are concerned.

Second. On December 31, 1917, the net investment of the plaintiff as shown by its books, based upon the appraisal of the Commission and the later investments, amounted to \$1,570,928.54. The plaintiff's contentions with respect to the fair rate base on the basis of this appraisal are thus stated in the brief of its counsel: "On December 31, 1917, the total fixed capital or gross investment, as shown in the books of the company, was \$1,907,871.70 * * *. Of this amount, however, the sum of \$336,943.16 was accrued amortization of capital. This amount may be said to represent the plaintiff's depreciation fund. It is invested (as it ought to be) in the plant and business of the plaintiff. Conceding for the sake of argument that the plaintiff should not be allowed to include this fund in the amount on which it is entitled to earn a fair return, we deduct this fund from the whole investment, leaving \$1,570,928.54 as the book amount. To this must be added the net floating capital, which indicates the working capital,—\$107,460.15 * * * making the total \$1,678,388.69. It is entitled to earn a fair return on this last amount without question, because it has set aside and is maintaining a fund sufficient at all times to cover depreciation. The plaintiff claims that to this amount should be added for going concern value at least the sum of \$422,214.46 as shown in Exhibit 19 and computed by adding the totals of the last two columns. This would make the total value for rate-making purposes at least \$2,077,744.69."

Before examining the additions for "working capital" and "going concern value" which the plaintiff desires, it should be observed that there is no controversy as to the propriety of the deduction for accrued depreciation. The allegations of the plaintiff's complaint proceed upon the view that such deduction should be made. For years the plaintiff has maintained a depreciation reserve, that is to say, the plaintiff has collected from consumers and charged to operating expenses an amount estimated to be necessary to cover the accrued depreciation in its plant. Its annual depreciation reserve, thus set aside out of the rates paid by consumers since the year 1913 have been as follows: 1914, \$33,458.75; 1915, \$21,687.10; 1916, \$45,425.63; 1917, \$43,188.51; or a total for these years of \$143,759.99. The amount carried in the general reserve account styled "accrued amortization of capital" represents the total extent of accrued depreciation according to the plaintiff's estimate. At the time of the Commission's appraisal of January 1, 1914, it appeared that the plaintiff's depreciation reserve amounted to \$124,539.61, and the Commission was of the opinion that this was an underestimate. Accordingly, estimating the accrued depreciation at \$215,065.13, the Commission directed that \$90,525.52 should be added to the depreciation reserve and charged out of surplus. In this, the plaintiff acquiesced. There is no evidence whatever to impugn the correctness of this estimate of the accrued depreciation or of the propriety of the annual additions to the depreciation reserve, or the correctness of the total estimate of accrued depreciation by the account known as "accrued amortization of capital" as it stood on December 31, 1917. The amount of the depreciation reserve has not been held in a separate fund, but has been invested in the plant and business, and the assets in which the depreciation reserve is invested are embraced in those which have been valued for the purpose of determining the rate base. Plaintiff thus has credit for all the property it uses in the public service and there is simply deducted the amount of its own estimate of the accrued depreciation in its plant, which is the equivalent of its reserve maintained by collections from consumers.

There is here no question of the power of the Commission to require a depreciation reserve. See *People ex rel. New York Railways Co. v. Public Service Commission, First District*, 223 N. Y. 373. The plaintiff has maintained the reserve. The plaintiff's calculations of net income are made after allowing for the annual depreciation charged against operating expenses, and, in computing the annual return which would be allowed by the rate which the plaintiff attacks, the same deduction is made of the amounts collected to offset the estimated accrued depreciation. It is manifestly proper that there should be a depreciation reserve. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 13, 14; *People ex rel. Jamaica Water Supply Co. v. Tax Commissioners*, 196 N. Y. 39, 57, 58; *People ex rel. Binghamton L., H. & P. Co. v. Stevens*, 203 id. 7, 22, 23. So far as the reserve was increased by the Commission's order in 1914, the plaintiff did not seek to review the determination but re-wrote its books accordingly. The question now as to that part of the reserve would not be whether the Commission had authority to make the order but whether the amount allowed for accrued depreciation according to the plaintiff's books as they have subsequently been kept, is excessive. There is no evidence and no contention to this effect. The only evidence apart from the plaintiff's books is the testimony of Mr. Shattuck, the plaintiff's expert, but this relates only to the depreciation he observed. He conceded that there was depreciation or deterioration of the property not covered by ordinary repairs and that he had not given consideration to it in his appraisal. In the absence of any countervailing evidence, the depreciation in the plant may fairly be taken at the amount shown in the books, and if the attacked rate permitted an adequate return after making such allowance, there would be no ground for asserting confiscation; and whether the rate is confiscatory is the question here. See *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 13, 14; *Minnesota Rate Cases*, 230 id. 352, 457; *Denver v. Denver Union Water Company*, 246 id. 178, 183, 191.

Working capital. There is no question as to the propriety of

an allowance for working capital, and the disagreement is only as to the amount. The plaintiff asks to have an addition of \$107,460.15 to its "total fixed capital — net investment" on this score and the Public Service Commission concedes that there should be added an allowance of \$85,000 for working capital. This difference may be said to measure the controversy upon this point. The record affords a very unsatisfactory basis for anything like a proper computation of the amount of working capital required by the plaintiff, and it is manifest that the difference between the amount conceded by the Public Service Commission in its estimate, based upon its experience and observation of the plaintiff's course of business, and the allowance for which the plaintiff asks, would figure to an inappreciable extent in the calculation of a fair return. The Commission's estimate appears to be based on materials and supplies on hand December thirty-first and the necessary outlay for cost of manufacturing gas until the point is reached when current receipts will be adequate to meet current expenses, estimated to be equivalent to the cost of manufacturing about two months' supply, and the total amount reached by the Commission on this basis was \$99,689 for the year 1916 and \$101,267 for 1917. From this amount the Commission deducted for materials, etc., which might be purchased on sixty to ninety days' credit, the amount of \$20,000 for each year. I am not satisfied that the plaintiff makes its purchases on such terms and I find no sufficient basis for this deduction. In my judgment a fair allowance for working capital is the sum of \$100,000.

Going value. It is well settled that the plaintiff is entitled to have its plant valued as a going concern. *Omaha v. Omaha Water Co.*, 218 U. S. 180, 202, 203; *Des Moines Gas Co. v. Des Moines*, 238 id. 153, 165; *Denver v. Denver Union Water Co.*, 246 id. 178, 191, 192; *People ex rel. Kings County Lighting Co. v. Willcox*, 210 N. Y. 479, 491. As was said in the *Des Moines Case*, *supra*: "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element

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of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use." And in the Kings County Lighting Co. Case, *supra*, it was said by the Court of Appeals: "The term 'going value,' though not exactly defined, has been used quite generally to comprise the elements not included in the structural value of the property in its present condition. The term is not important. The point is that in some manner and under some appropriate heading a due allowance must be made for the investment in those elements."

It has already been noted that in the rate proceeding in the year 1913 the Public Service Commission allowed the sum of \$180,000 for "Preliminary and Development," which it was said related "to the initial promotion of the scheme, the organization of the Company and the securing of franchises and permits" and in general "all preliminary and development expenses, including interest and taxes during construction." The amount thus allowed was in addition to the sum allowed for working capital. In the succeeding appraisal as of January 1, 1914, as already pointed out, the Commission allowed items for "organization," for "other intangible capital" and for taxes, interest and legal and miscellaneous expenses during construction the aggregate amount of \$180,000 in addition to the estimated value of the land and the cost of the reproduction of the various parts of the plant. On the assumption that these items do not include working capital, which seems to be conceded, an additional allowance for working capital has been made. It thus appears that there has been in the Commission's appraisal a considerable amount allowed for the expense of assembling and establishing the plant as a going concern.

The plaintiff, however, insists that the Commission in its allowance for preliminary and development expenses did not allow for pioneer losses or failure to earn profits during the development period (see 2 P. S. C. Rep., 1st Dist., 638) and that it is entitled to such an allowance for deficiencies in earnings

under the rule established in the Kings County Lighting Co. Case, *supra*. In that case "going value" for rate purposes as there involved was defined "to be the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property."

Mr. Shattuck made an estimate of \$489,939 for "going value," but it was not satisfactorily supported. In its original exhibit the plaintiff estimated that its deficiency of earnings or pioneer losses amounted to \$422,214.46. This was made up of \$250,-515.83, being the aggregate amount, in principal, of the alleged annual deficiencies in the plaintiff's "fair return" on actual investment, less depreciation, and \$171,698.63 for interest on these annual deficiencies. To meet the criticism of the Public Service Commission the plaintiff has modified the statement and reduced its estimate to the sum of \$299,025.87. In this revised tabulation the plaintiff states the aggregate amount of the alleged annual deficiencies in earnings at \$160,062.87, in principal, the remainder of its claim being for interest on these deficiencies amounting to \$138,963.

It is sufficient to point out that there is a lack of proper proof as to the plaintiff's earnings during a considerable portion of the period involved which would make it impossible to accept the plaintiff's tabulation, as the existence of the asserted deficiencies cannot be assumed without proof. See *Des Moines Gas Co. v. Des Moines*, 238 U. S. 166; *People ex rel. Kings County Lighting Co. v. Willcox*, 210 N. Y. 492-494. But even if it were assumed that the earnings as stated in the plaintiff's tabulation had properly been proved, the deficiency is arrived at by computing a "fair return" at the rate of $7\frac{1}{2}$ per cent per annum, and if the "fair return" were computed at 6 per cent instead of $7\frac{1}{2}$ per cent there would be no basis for any substantial claim for deficiency in earnings. In other words, upon a 6 per cent basis, it would appear that "pioneer losses" had

been made up out of the earnings actually received. While it may be entirely proper to allow a public service corporation a return of $7\frac{1}{2}$ per cent upon its investment, it cannot be considered that a legislative rate otherwise adequate is beyond the legislative power as confiscatory because it does not permit a return upon a rate base embracing a capitalized deficiency in earnings, where it appears that the corporation has received an amount equivalent to 6 per cent upon its investment from the beginning of its enterprise, and that there has also been allowed a fair return upon a rate base embracing reasonable amounts for the preliminary expenses incident to the inception of the enterprise and its establishment as a going concern such as were allowed by the Commission in its appraisal in this case. The claim for an additional amount as going value to cover alleged pioneer losses has not been sustained.

The Public Service Commission contends that there should be deducted from the plaintiff's "total fixed capital — net investment" the amounts included as representing the value of the parcels of land situated respectively at West Fifth street and Sheepshead Bay road, Coney Island avenue, and on Mermaid avenue. These amounts aggregate only \$41,605.26. Whether or not they are included in the rate base will make no difference in the result.

The West Fifth street property is the site of a plant formerly used by the company which has been abandoned. It lies away from the seashore and distant from the amusement section of Coney Island. The land is vacant except for a tar-pit containing a quantity of tar, a gas residue, but the company has not yet discovered a method of turning this residue into cash. It is said that it lies below the surface and that it would be expensive to dig it out; also that there has been no demand for the property and that the company has been unable to sell. The property has not been used for gas-making purposes since 1914. Property of this sort, at one time useful, which has been abandoned in the progress of appropriate development in the interest of the public, should not be eliminated from the investment upon which a public

utility is entitled to a fair return until there has been a reasonable opportunity to dispose of it. If such property could not be carried for a reasonable period there would be a hindrance to proper development to the injury of the public. What is a reasonable time must be determined according to market conditions in the locality and the circumstances of the particular case. In the present case, in view of the inability of the company to sell, I think that it is fair that the property should still be taken into consideration as a part of the company's investment for rate-making purposes.

The parcel on Coney Island avenue was acquired in 1915, as already stated, as a site for an office building. It was considered essential that the company should have an office in the Kings highway district on account of the large number of consumers there, at a distance of four and one-half to five miles from the Coney Island office. On account of the conditions which prevailed immediately after this purchase and by reason of the enactment of the legislation here in controversy, the company has not been able to erect the office building which its business seems to require. The expenditure is a modest one and the delay in providing the building is sufficiently explained. I think that the property should be treated as a part of plaintiff's investment in its service to the public.

The remaining parcel is one on Mermaid avenue, which was purchased in the year 1917. The purpose was to erect a new office building in Coney Island, where the company has a frame building without any cellar, described as unhealthy. I find, however, no proper evidence of the value of this property, and for this reason, apart from the propriety of the purchase, it cannot be included in the rate base.

The Public Service Commission also contends that the entire expense of this proceeding should not be applied to the present income in considering whether that is adequate under the legislation in question, but should be spread over a period of five years and amortized accordingly, and that the unamortized rate expense should be added to the capital account. This contention is sus-

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tained, and on this basis there is added to the capital account for 1917 the sum of \$8,648.

I therefore conclude that the fair value of the company's plant for the purpose of determining whether the rate is confiscatory is \$1,670,492.54, as follows:

Total fixed capital as of December 31, 1917.....	\$1,907,871 70	
Less —		
Accrued amortization	\$336,943 16	
Mermaid avenue property.....	9,084 00	
		346,027 16
		<hr/>
		\$1,561,844 54
Working capital	100,000 00	
Unamortized rate expense.....	8,648 00	
		<hr/>
Total fair value.....	\$1,670,492 54	

Results of Operation. The following is a summary of the results of the plaintiff's operations, as to which there is no dispute, in the years 1911 to 1917 inclusive:

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	1911	1912	1913	1914	1915	1916	1917
Cubic feet of gas sold	242,777,300	273,253,000	318,505,700	363,852,400	374,142,800	419,622,400	462,964,400
Operating revenues:							
Municipal sales of gas	\$8,756 69	\$9,552 46	\$10,387 09	\$11,390 71	\$11,490 40	\$11,321 02	\$434,645 62
Commercial sales of gas	227,521 32	257,869 19	298,706 52	329,347 43	339,592 89	382,751 07	
Miscellaneous sales of gas	6,283 07	4,544 71	8,564 23	14,238 64	20,937 13	28,328 12	19,715 59
Total	\$242,561 08	\$271,966 36	\$317,657 84	\$354,976 78	\$372,020 42	\$422,400 21	\$454,361 21
Operating expenses:							
Production	\$59,930 45	\$68,537 36	\$79,170 31	\$95,825 35	\$98,879 30	\$122,618 11	\$192,952 13
Distribution	16,592 34	20,565 12	31,150 43	32,361 84	33,142 59	35,388 96	37,807 65
Commercial	20,364 88	21,292 07	24,629 78	32,365 76	30,845 54	37,881 44	40,524 86
General (except amortization)	16,152 59	16,012 49	18,695 49	24,109 29	39,560 10	48,483 68	48,652 00
Total (except amortization)	\$113,040 28	\$126,427 04	\$155,546 01	\$184,662 24	\$202,427 53	\$244,372 19	\$319,936 74
Depreciation	\$29,069 83	\$34,033 63	\$36,374 76	\$33,458 75	\$21,687 10	\$45,425 63	\$43,188 61
Taxes	13,943 59	14,931 65	18,158 01	19,383 88	23,274 38	27,513 19	29,687 31
Uncollectible bills	1,770 07	949 43	847 55	883 46	945 30	1,173 31	539 13
Total revenue deductions	\$157,823 77	\$176,341 75	\$210,928 33	\$238,267 83	\$248,334 31	\$318,484 32	\$393,351 69
Operating income	\$84,737 31	\$95,624 61	\$106,731 61	\$116,708 95	\$123,686 11	\$103,915 89	\$61,009 52
Other income — rents, interest	223 25	144 00	.....	179 70	218 13	829 67	960 48
Gross income	\$4,960 56	\$95,768 61	\$106,731 61	\$116,888 65	\$123,904 24	\$104,745 56	\$61,970 00

In the foregoing statement, the revenue for the years 1914 to 1917, inclusive, for gas supplied to private consumers is computed at the ninety-five-cent rate which the plaintiff has actually charged. The reduction in operating income at this rate in the years 1916 and 1917 is largely due to the increased outlays for gas oil and for boiler and generator fuel. The Public Service Commission has submitted tabulations showing that the cost of gas oil increased from 12.03 cents (per 1,000 cubic feet of gas) in the year 1911 to 14.86 cents in 1915, to 17.48 cents in 1916 and to 24.06 cents in 1917, and that the cost of boiler and generator fuel which was 8.72 cents (per 1,000 cubic feet of gas) in 1914 was 8.50 cents in 1915, 9.47 cents in 1916 and 14.09 cents in 1917. The plaintiff criticizes this tabulation upon the ground that the figures are not comparable, as the 1917 costs are figured entirely on the gas sold, whereas the costs for the other years are figured partly on the gas sold and partly on gas made. In its corrected figures the plaintiff states that the cost of boiler and generator fuel rose from 8.38 cents in 1911 to 10.05 cents in 1914, 9.73 cents in 1915, 10.63 cents in 1916 and 14.09 cents in 1917. On account of these increased outlays, and despite largely increased sales, the operating income, which reached its highest point in 1915, being \$123,686 for that year, fell to \$103,915 in the year 1916 and to \$61,009 for the year 1917, on the basis of the ninety-five-cent rate actually charged by the plaintiff to private consumers.

The eighty-cent-rate of 1916. With the same amount of gas sold, and with the same expenses, the total income for the year 1916, had there been a charge during that entire year of eighty cents per 1,000 cubic feet of gas sold to private consumers, would have amounted to \$44,591. This amount would have been insufficient to pay the annual interest (\$50,000) on the company's bonds and would have afforded no return whatever upon the value of the plaintiff's property in excess of the amount of the bonded debt.

In the year 1917, on the basis of the actual gas sales of that year, and assuming the same expenses, the effect of the reduction from the ninety-five-cent rate to the eighty-cent rate for

private consumers would have been to wipe out the total income of \$61,970 and to leave a deficit of \$4,904.25. That is, the reduction caused by the eighty-cent rate upon the same business in the year 1917 would have amounted to \$66,874.25, which is in excess of the operating income plus the additional income of the plaintiff (aggregating \$61,970) to the extent of \$4,904.25.

The prospect for the year 1918 is no better, but would seem to be worse in view of the increased price of oil. No criticism has been submitted touching the figures that have been given for operating costs. The plaintiff has kept its books in accordance with the requirements of the Public Service Commission and all cost data have been subject to investigation. Neither the amount of the plaintiff's sales, its revenue therefrom, nor its outlays in operation have been controverted. Distributing the expenses of this action, called rate expense, over a period of five years, and charging to the income for the years 1916 and 1917 respectively only the portion of the rate expense thus allocated to those years, in accordance with the Commission's contention, there would be a slight increase in the operating income, so as to bring the operating income for 1916 (at the ninety-five-cent rate actually charged) to the sum of \$108,595 instead of \$103,915, and the operating income for 1917 to the sum of \$70,115 instead of \$61,009. The effect of this, on the assumption that the eighty-cent rate had been charged to private consumers during the entire year 1916, would be that the income of the plaintiff, instead of being \$44,591 would have been on this basis \$49,271. This would still have been insufficient to pay the bond interest. Similarly, at the eighty-cent rate for the year 1917, there would have been, according to this method of distributing the rate expense, an income of \$4,202 instead of a deficit. This would have given a return of about one-fourth of one per cent upon the fair value of the plaintiff's property. For the year 1918 the result would apparently be no better.

There is no question as to the effect upon this plaintiff of the eighty-cent rate fixed by chapter 604 of the Laws of 1916. It was fixed at a time when the cost of making gas had greatly increased and the returns from operation had been greatly reduced. No

estimate of the value of the plaintiff's property has been submitted upon which it would be even arguable that this rate of eighty cents affords a fair return under existing conditions. The conditions are abnormal, but they exist. The plaintiff is at all times subject to regulation. If its profits rise through decreased operating costs, its rates are subject to reduction. It may insist at any time only upon a fair return and it is essential to the protection of the public through the continuance of its service, that it should have a fair return when its revenues are depleted by increased operating expenses. When the abnormal conditions entailing the increased outlays change, rates may be adjusted accordingly.

The eighty-cent rate enacted by the Legislature is palpably confiscatory and the plaintiff is entitled to judgment restraining its enforcement.

The seventy-five cent rate for gas supplied to the city of New York. This rate was fixed by chapter 736 of the Laws of 1905. Its validity was sustained in *Willcox v. Consolidated Gas Company*, 212 U. S. 19, 54. The United States Supreme Court in that case said: "We cannot see, from the whole evidence, that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return, it is not important that, with relation to some customers, the price is not enough." Referring to this statement, the same court said, in *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585, 601: "It was not established in that case (the *Consolidated Gas Company* case) that this 'wholesale' rate required a service without substantial compensation in addition to cost." That remark applies here. The sales to the city are small, amounting to less than 4 per cent of the total sales. In the year 1916, out of total gas sales of 419,622,400 cubic feet only 15,123,200 cubic feet were sold to the city. In the year 1917, out of total sales of 462,964,400 cubic feet, there were 14,808,500 cubic feet sold to the city. There

is no evidence upon which it can be said, taking into consideration the special conditions under which gas is supplied to the city, that the plaintiff is required to furnish this gas without substantial remuneration, and no case has been made for invalidating the act of 1905. Prior to the act of 1916 the plaintiff had no ground for complaint upon this score and relief as against that act restores it to the same position.

The ninety-five cent rate fixed by the Public Service Commission in 1913. It is apparent that the ninety-five-cent rate does not allow a fair return under existing conditions. Even in the re-distribution of rate expenses, so as to reduce the amount charged against the income for the year 1917, the total income thus calculated for the year 1917 at the ninety-five-cent rate would be \$70,115, or less than 4½ per cent on the fair value of the plaintiff's property conservatively computed.

But I am of the opinion that the effect of the passage of chapter 604 of the act of 1916 establishing the eighty-cent rate as a statutory maximum was to supersede the ninety-five-cent rate fixed by the Public Service Commission. By section 72 of the Public Service Commissions Law it is provided that the Commission may "fix the maximum price of gas or electricity not exceeding that fixed by statute." The power of the Commission was thus expressly limited by the Legislature so that it could not at any time fix a rate exceeding that fixed by the Legislature itself. When the eighty-cent rate was fixed, this became the maximum price "fixed by statute" and the authority of the Commission was limited accordingly.

It is urged, however, that as the eighty-cent rate is found to be confiscatory, the legislation of 1916 was not effective to displace the Commission's rate. But this argument overlooks the fact that the eighty-cent rate is found to be invalid only as against the plaintiff, that is, upon the facts disclosed with respect to the value of its property and the return the rate affords to the plaintiff. The act of 1916 was valid upon its face, and can be attacked only by those injured, — as to whom it is proved to be confiscatory. The decree to be entered in this action, as is appro-

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prate in such cases, should provide that the defendants may apply at any time to the court as they may be advised for a further order or decree whenever it shall appear that by reason of a change in circumstances the rate is sufficient to yield to the plaintiff reasonable compensation for the service rendered (see *Missouri Rate Cases*, 230 U. S. 474, 508); and in this event the rate would become enforceable against the plaintiff under the legislation in question, that is, without further legislative action. The act of 1916 did not exceed the power of the legislature so far as the Public Service Commission was concerned, and it was effective to establish the statutory maximum which could not be exceeded by the Commission, although it might be inoperative as against the plaintiff during the period that it failed to afford to the plaintiff a fair return. It is manifest that if the Legislature had intended to permit the Commission to fix a rate in excess of the statutory maximum, in case the latter was found to deny adequate compensation, it would have left the Commission power to fix a rate according to what was found to be reasonable, thus permitting the Commission to perform its appropriate function. But the Legislature took the matter into its own hands and refused jurisdiction to the Commission to exceed the statutory maximum in any case.

The question as to the proper interpretation of section 72 of the Public Service Commissions Law is determined by the recent decision of the Court of Appeals in *People ex rel. Municipal Gas Co. v. Public Service Commission*, Second District, 224 N. Y. 156, decided July 12, 1918. In that case the question was whether the Public Service Commission had power to fix a rate for gas supplied in the city of Albany in excess of the rate fixed by chapter 227 of the Laws of 1907, that statutory rate being alleged to be confiscatory. The court said: "The question thus presented to us is not between the gas company and the state; it is between the commission and the state. The power can be in the commission through no other than legislative source. The commission can exercise only such powers as have been specially conferred by statute, together with those incidental

powers which may be requisite to effectually carry out those actually granted. (People ex rel. New York Railways Company v. Public Service Commission, First District, 223 N. Y. 373.) The legislature empowered the commission to fix by order, in any given case, the maximum price 'not exceeding that fixed by statute. * * *' The legality of this empowerment and of the restriction upon it is not and cannot be questioned. It matters not between the legislature and the commission that the legislative maximum is confiscatory — even manifestly confiscatory. Did the provision of section 72 read that the commission might fix the maximum price not exceeding for the city of Albany, however, the maximum of fifty cents per one thousand cubic feet as fixed by a named statute, we can conceive of no ground or reason impeaching its validity. The legislature may, within constitutional limits, withhold from the commission power or jurisdiction as its wisdom or choice may determine. In the present case, chapter 227 of the Laws of 1907 is to be read with or into the provision of section 72. The legislative intention concerning the power of the commission is as clear and certain as it would be did the provision contain the words 'not exceeding, however, for the city of Albany, one dollar per one thousand cubic feet fixed by chapter 227 of the Laws of 1907 as the maximum for that city.' The chapter 227 may be invalid as to the gas company as a taking of its property without just compensation, but as to the commission it, read with the provision of section 72, is an unmistakable and valid restriction upon the power of the commission. As to the commission, it is not the chapter 227 which is being enforced, it is the provision of section 72, and the chapter is involved only as a legislative boundary of the power bestowed by the sections 65, 66, 71 and 72 upon the commission. The legislature evidently intended to retain unto itself the power of fixing rates exceeding those fixed as the greatest by statutes. We cannot discern in such retention of legislative power any violation of a constitutional provision."

It is true that in that case there had been no decision by a court that the statutory rate was confiscatory and hence the

enforcement of that rate had not been enjoined. But the question was considered whether section 72 denied to the Commission the power to fix a higher rate than that fixed by statute even though the statutory rate was in fact confiscatory. And the court reached the conclusion that although the statute fixing the rate might be invalid as to the gas company as a taking of its property without compensation, yet as to the commission the statute, read with the provisions of section 72, was "an unmistakable and valid restriction upon the power of the commission." In the present case, so far as the Commission is concerned, the act of 1916 furnishes "a legislative boundary" of the power bestowed upon the Commission; and it is as clear with respect to the act of 1916, as it was with respect to the act of 1907 in relation to the city of Albany, that "the legislature evidently intended to retain unto itself the power of fixing rates exceeding those fixed as the greatest by statutes."

The ninety-five-cent rate, as a Commission rate, can be deemed to be enforceable only by virtue of authority continued to be possessed by the Commission to maintain and enforce it. It derives its vitality wholly from the power of the Commission as a continuing power. The conclusion, which I deem to be inevitable, that the Commission would now have no power to fix a rate higher than the statutory eighty-cent rate necessarily involves the further conclusion that the ninety-five-cent rate is no longer effective, for to say that the ninety-five-cent rate is still enforceable, although the Commission is without power to fix a higher rate than eighty cents, would be to disregard the entire purpose and effect of the Public Service Commissions Law which maintains the rate fixed by the Commission only in the view that it is subject to the Commission's control and may be altered by the Commission whenever it is found to be unreasonable. Under section 72, the Commission's rate is to continue until a different rate is fixed by the Commission. This implies that it continues only while the rate is within the scope of the Commission's authority, and when the Legislature fixed its own rate and denied the power of the Commission to fix a rate higher than this

eighty-cent statutory rate, it necessarily superseded the Commission's rate.

The one dollar rate fixed by chapter 125 of the act of 1906. The plaintiff submits that a decision that the act of 1916 fixing the eighty-cent rate is confiscatory as to the plaintiff operates to revive the act of 1906, which fixed the one dollar rate, and that this last named rate is also confiscatory. The Public Service Commission does not take the view that the act of 1906 is revived, but contends that the act of 1916, although confiscatory as to the plaintiff, did operate to repeal the provisions of the act of 1906 to which it referred.

I think that the Commission is right. Section 1 of chapter 125 of the act of 1906 is as follows:

"SECTION 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of The Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:

"1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the borough of The Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

"2. In the second and fourth wards of the borough of Queens, and in the thirtieth ward of the borough of Brooklyn, one dollar.

"3. In the third ward of the borough of Queens, in the thirty-first ward of the borough of Brooklyn, and in the borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine;

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one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

"4. In that portion of the borough of The Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter."

Chapter 604 of the act of 1916 is as follows:

"SECTION 1. Subdivisions one, two and three of section one of chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled 'An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation,' are hereby amended to read, respectively, as follows:

"1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn and in the borough of The Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

"2. In the second, third and fourth wards of the borough of Queens, and the borough of Richmond, one dollar.

"§ 2. This act shall take effect July first, nineteen hundred and sixteen."

The Legislature thus re-wrote its provisions and established the statutory maxima for the territory described. There is no question as to the legislative intent to effect the substitution and thus to repeal the prior provisions. That is perfectly clear and requires no process of reasoning to show the intent to repeal. The case is not within the decisions that where an amending act is wholly void it has no effect upon a prior act which was sought to be amended. *People ex rel. Farrington v. Mensching*, 187 N. Y. 8. The act of 1916 is not a void act. It is valid on its face as an exercise of governmental authority in the establish-

ment of reasonable rates, and it is invalid only in so far as it appears that the rate is confiscatory as to a particular complaining party, and when it is found that this ceases to be the case, it becomes enforceable even as to that party. The statute is not invalid as a repealing act, but re-cast the provisions of the earlier statute and fixed a new legislative standard involving, as already stated, a new measure of the authority of the Public Service Commission.

My conclusion on this branch of the case is that subdivisions 1, 2 and 3 of section 1 of chapter 125 of the act of 1906 have been repealed so far as the act of 1916 substitutes a new legislative rate.

The court has no power to fix what is a reasonable rate and the Legislature has seen fit to deprive the Commission of power to afford the relief to which the plaintiff is entitled. As the plaintiff is thus left without adequate remedy, it is entitled to relief in equity from the enforcement of the statutory rate, which has superseded the earlier rates, so long as that rate denies to the plaintiff a fair return for its public service.

Findings will be signed in accordance with this opinion.

In the Matter of the Application of the INTERBOROUGH RAPID TRANSIT COMPANY for Authority to Issue \$25,483,772 Face Amount of 5 Per Cent Bonds Under and Secured by its First and Refunding Mortgage Dated March 20, 1913

Case No. 2218

(Public Service Commission, First District, July 23, 1918)

An issue of bonds, authorized by the Commission, having been found to be unsalable under the terms prescribed, and on application by the corporation interested, an increase in the amount of bonds issuable authorized because of higher prices resulting from war-time conditions, and permission granted for issuance of short term notes secured by pledge of the bonds authorized as the result of said application.

The Interborough Rapid Transit Company on June 11, 1917, petitioned for permission to issue \$25,483,772 face value of its 5 per cent bonds

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secured by its first and refunding mortgage dated March 12, 1913. The Commission after a hearing authorized the issuance of such bonds to the amount of \$23,053,000. The corporation found it impossible to market said bonds under the terms of the authorizing order and thereupon secured a rehearing by the Commission. As the result of such rehearing the Commission substituted the present order for the previous one and permitted the issuance of bonds of a total face value of \$33,098,500 under conditions set forth in the order. The issuance of short term notes secured by a pledge of the additional bonds of the corporation also authorized. Specific conditions and restrictions as to the said bonds and notes set forth in the order together with the purposes of the said issue.

BY THE COMMISSION.— Section 1. Application was made to the Public Service Commission for the First District by Interborough Rapid Transit Company by its petition dated and verified June 11, 1917, under the provisions of the Public Service Commissions Law for the consent of the Commission to the issuance by said company of \$25,483,772 face amount of 5 per cent bonds under and secured by its first and refunding mortgage dated March 20, 1913, claimed to be necessary for purposes in said petition set forth, in addition to the bonds authorized to be issued under said mortgage by order of the Commission made and filed March 20, 1913, in Case No. 1614. A hearing was duly had upon said petition before the Commission, Hon. Oscar S. Straus, Chairman, William Hayward, Travis H. Whitney, Henry W. Hodge and Charles S. Hervey, Commissioners, presiding, and the Commission thereafter made and filed its order on the 27th day of July, 1917, wherein and whereby the Commission allowed an issue by said company of \$23,053,000 face value of said bonds. Application having been now made to the Commission by the said Interborough Rapid Transit Company by its petition dated and verified June 24, 1918, praying that a rehearing be granted herein and stating that it has been impossible to sell the bonds under the terms of the said order of July 27, 1917, and that it will be necessary to secure the moneys required through the issue of short-term notes secured by petitioner's bonds as collateral and that for that purpose as well as providing for increased cost because of war-time prices the approval by the Commission of

the issue and disposal either by sale or pledge of a greater amount of bonds than those heretofore authorized will be necessary; and the Commission having granted such rehearing and the same having been had before the Commission, Hon. Oscar S. Straus, Chairman, Travis H. Whitney, Charles S. Hervey, Frederick J. H. Kracke and Charles Bulkley Hubbell, Commissioners, presiding, James L. Quackenbush, Esq., appearing for the Interborough Rapid Transit Company, and William P. Burr, corporation counsel, and John F. Collins, assistant corporation counsel, appearing for the city of New York, and the Commission having considered the testimony and documents presented and heard the argument of counsel, and due consideration having been had, and it being now the opinion of the Commission:

1. That the money to be procured by the issue of additional bonds of the Interborough Rapid Transit Company to the amount of not to exceed \$33,098,500 face value payable at a period of more than twelve months after the date thereof is necessary to and reasonably required by said company for the acquisition of property or for the construction, completion, extension or improvement of its facilities, and particularly for the purposes which are hereinafter stated in this order; and

2. That, except as to the following specified amounts of said bonds authorized to be issued hereunder to procure money to be applied to the purposes following, to wit:

(1) \$953,235, or so much thereof as may be necessary, to pay expenses of the sale of notes secured by pledge of bonds hereby authorized and to make up the discount or deficiency in the amount realized upon the sale of said notes to net not less than 95½ per cent of par of said notes.

(2) \$11,915,503, or so much thereof as may be necessary, to make up discount by reason of conversion of any of said notes into bonds at 87½ or sale of said bonds pledged as collateral security for said notes at not less than 64; said purposes are not in whole or in part reasonably chargeable to operating expenses or to income;

Section 2. It is ordered, That the Public Service Commission for the First District does hereby authorize the issue by the said

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Interborough Rapid Transit Company of \$33,098,500 face value of principal of bonds of said company dated as of January 1, 1913, maturing the 1st day of January, 1966, redeemable at 110 per cent of the face value thereof besides accrued interest on any interest day and bearing interest at five per cent per annum payable semi-annually under and in pursuance of the terms of the mortgage of the said Interborough Rapid Transit Company dated March 20, 1913.

Section 3. It is ordered, That said issue of bonds is authorized upon the conditions following (each of which is hereby specifically made a condition of the approval and the issuance of bonds) and not otherwise, to wit:

First. That the said Interborough Rapid Transit Company shall dispose of the said bonds hereby authorized by pledge of the same at not less than 64 per cent of the face value thereof as collateral security for three-year 7 per cent notes of said company dated as of July 1, 1918, redeemable in whole or in part if approved or so directed by the Commission at 105 per cent of the face value of said notes besides accrued interest, provided the company has or may secure funds available therefor and convertible at maturity into said bonds at 87½ per cent of the face value of said bonds and the proceeds thereof shall be applied only to the following purposes, that is to say:

1. To pay the cost of equipment of the rapid transit railroad under and pursuant to a certain contract (referred to hereinafter as Contract No. 3) dated March 19, 1913, between the city of New York, acting by the Public Service Commission for the First District, and the Interborough Rapid Transit Company, as such cost may be determined pursuant to said contract, including in such equipment any improvement, reconstruction, modification or change authorized by the said contract dated March 19, 1913, and made pursuant thereto of the power houses, substations or other electrical equipment forming part of the

existing equipment of rapid transit railroads now leased to and operated by the Interborough Rapid Transit Company under contracts known and described as contract No. 1 and contract No. 2.... \$20,229,762

2. For expenses of the sale of notes to be secured by a pledge of bonds hereby authorized and to make up the discount or deficiency, if any, in the amount realized upon the sale of said notes to net not less than 95½ per cent of par of said notes and to be applied for the purposes above specified not exceeding..... 953,235

\$21,182,997

3. To make up the discount or deficiency, if any, in the amount realized upon the disposition of the bonds disposed of by said pledge for the purposes referred to in subdivisions 1 and 2 of this paragraph by reason of the conversion of any of said notes into such bonds at maturity at 87½ per cent of the face value of said notes or the sale of said bonds pledged as collateral security for said notes at not less than 64 per cent of the face value of said bonds, the proceeds to be applied *pro rata* for the purposes in said subdivisions stated not exceeding the sum of 11,915,503

\$33,098,500

Second. That all of the bonds hereby authorized shall be amortized, prior to the maturity of the said bonds, out of the income of the company; provided, however, that the said amortization may be effected through the operation of the sinking fund provided for by the aforesaid first and refunding mortgage.

Third. That the said company shall keep separate, true and accurate accounts, showing the receipt and application in detail of the proceeds of the sale or disposal of the bonds hereby

authorized to be issued, and on or before the twentieth day of each month, the company shall make and file with the secretary of the Commission verified reports to the Commission, stating the sale or sales of the said bonds during the preceding month, the terms and condition of sale, the moneys realized therefrom, and the details of the use and application of said moneys toward the separate purposes specified in paragraph first above; and the said accounts, vouchers and records shall be open to audit, and may be audited, from time to time, by accountants and examiners designated for such purpose by the Commission.

Fourth. In case any of the proceeds of the aforementioned bonds hereby authorized for the purposes specified in subdivision 1 of paragraph first of section 3 of this order shall be expended by the said company and the amounts so expended or any portion thereof shall not be included in or made a part of the said cost of equipment as finally determined pursuant to the said contract No. 3 referred to in subdivision 1, the company shall, forthwith after such determination, return to the fund derived from the issue of bonds hereby authorized the amount not so included in any such determination.

Fifth. That any sums accruing to the company, directly or indirectly, from interest on the deposit, or from the investment, of any proceeds of the bonds hereby authorized shall be considered and accounted for as and as though a part of, but in addition to, the proceeds of the said bonds; provided, however, that this condition shall be without prejudice to any right or claim which the said company may otherwise have against the city of New York, or the city of New York may otherwise have against the said company, by reason of any obligation on the part of the said city or the said company under or pursuant to any provision of the said contract No. 3.

Sixth. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in abrogation, limitation or modification of any right of the city of New York or of the Commission under or pursuant to the said contract No. 3, or in derogation of any of the rights and powers

of the Commission under subdivision (6) of paragraph 18 of article II of contract No. 3, or the right of the city of New York or the Commission to disallow, object to and contest any items of claimed expenditure or charge by the Interborough Rapid Transit Company under the provisions of contract No. 3 or any expenditure of any part of the proceeds of the bonds hereby authorized.

Seventh. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in derogation or limitation of any right and power otherwise possessed by the Commission to require, in a subsequent proceeding or by future order in this case, the amortization, reclassification of accounts or other suitable provision, as to expenditures deemed to be for purposes in the nature of replacements or chargeable under the Public Service Commissions Law to operating expenses or income.

Eighth. That the authority hereby given to issue such bonds shall apply only to bonds issued by said company on or before the 31st day of December, 1921.

Section 4. It is ordered, That this order take effect on the 23d day of July, 1918, and, except as provided in paragraph eighth of section 3 of this order limiting the duration of the authority to issue such bonds herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order said company notify the Commission whether the terms of this order are accepted and will be obeyed.

It is further ordered, That the order of the Commission made and filed herein on the 27th day of July, 1917, be and the same hereby is resettled and amended so as to read and provide as above, and the said order of July 27, 1917, is hereby abrogated and this order substituted in place thereof.

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In the Matter of the Application of INTERBOROUGH RAPID
TRANSIT COMPANY for Authority to Issue and Dispose of
\$39,416,000 Face Amount of Three-Year 7 per cent Notes

Case No. 2306

(Public Service Commission, First District, July 23, 1918)

Application by a transportation corporation for permission to issue certain of its short term notes.

The Interborough Rapid Transit Company on June 29, 1918, as amended July 19, 1918, petitioned the Commission for authority to issue \$39,416,000 face value of its 7 per cent notes, convertible into 5 per cent bonds at 87½ per cent of face value. A hearing having been had, upon the facts adduced the petition was granted with conditions and restrictions specifically set forth in the order.

BY THE COMMISSION.—Section 1. Application having been made to the Public Service Commission for the First District by Interborough Rapid Transit Company by its petition dated and verified June 29, 1918, as amended July 19, 1918, for the consent of the Commission to the issuance by said company of \$39,416,000 face value of 7 per cent notes, dated as of July 1, 1918, maturing July 1, 1921, convertible at maturity into 5 per cent bonds of said company at 87½ per cent of the face value of said bonds, the issue of which is claimed to be necessary for purposes in said petition set forth; and a hearing having been duly had upon said petition before the Commission, Hon. Oscar S. Straus, chairman, Travis H. Whitney, Charles S. Hervey, Frederick J. H. Kracke and Charles Bulkley Hubbell, Commissioners, presiding, James L. Quackenbush, Esq., appearing for the Interborough Rapid Transit Company, and William P. Burr, corporation counsel, and John F. Collins, Esq., assistant corporation counsel, appearing for the city of New York, and the Commission having heard the testimony and documents presented together with the argument of counsel and due consideration of the same having been had, and it being now the opinion of the Commission:

1. That the money to be procured by the issue of notes of the Interborough Rapid Transit Company to the amount of \$39,416,000 face value payable at a period of more than twelve months after the date thereof is necessary to and reasonably required by said company for the acquisition of property or for the construction, completion, extension or improvement of its facilities, and particularly the purposes which are hereinafter stated in this order; and

2. That, except as to the following specified amounts of said notes authorized to be issued hereunder to procure money to be applied to the purposes following, to wit:

(1) \$2,000,000, or so much thereof as may be necessary, to pay the cost of replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of the existing power house, substations, transmission lines or electrical apparatus of the existing Manhattan Railroad;

(2) \$1,773,720, or so much thereof as may be necessary, to pay expenses of sale of notes hereby authorized and to make up discount; said purposes are not in whole or in part reasonably chargeable to operating expenses or to income;

Section 2. It is ordered, That the Public Service Commission for the First District does hereby authorize the issue by said Interborough Rapid Transit Company of \$39,416,000 face value of principal of notes of said company dated as of July 1, 1918, maturing July 1, 1921, bearing interest at 7 per cent per annum, payable semi-annually, secured by 5 per cent bonds of the Interborough Rapid Transit Company issued under its first and refunding mortgage dated March 20, 1913, maturing January 1, 1966, authorized to be issued by this Commission by its certain orders made and filed July 23, 1918, in Cases Nos. 2182 and 2218, deposited as collateral security for the payment of the said notes, and the said notes being redeemable, in whole or in part, if approved or so directed by the Commission, at 105 per cent of the face value of said notes besides accrued interest provided the company has or may secure funds available therefor and convertible at maturity of said notes into said bonds at 87½ per cent of the par or face value of said bonds.

Section 3. It is ordered, That said issue of notes is authorized upon the conditions following (each of which is hereby specifically made a condition of the approval and issue of notes) but not otherwise, to wit:

First. That the said Interborough Rapid Transit Company shall sell the said notes hereby authorized so as to net the said company not less than 95½ per cent of the face value of the principal thereof besides interest accrued thereon, and that the proceeds thereof shall be deemed to be proceeds of the said bonds deposited as collateral security for the payment of said notes and that the said proceeds of said notes shall be used when and as ready and be applied only to the following purposes, that is to say:

(1) To pay the cost of equipment of the rapid transit railroad under and pursuant to a certain contract (referred to hereinafter as contract No. 3) dated March 19, 1913, between the city of New York, acting by the Public Service Commission for the First District, and the Interborough Rapid Transit Company as such cost may be determined pursuant to said contract including in such equipment any improvement, reconstruction, modification or change authorized by said contract dated March 19, 1913, and made pursuant thereto of the power houses, substations or other electrical equipment forming part of the existing equipment of rapid transit railroads now leased to and operated by the Interborough Rapid Transit Company under contracts known and described as contract No. 1 and contract No. 2..... \$20,229,762

(2) To pay the actual cost of plant and structure and of equipment of third or additional tracks upon lines of elevated railroad of the Manhattan Railway Company (leased to and operated by the Interborough Rapid Transit Company) under and pursuant to a certificate authorizing the construc-

tion, maintenance and operation of such third or additional tracks granted to said company, dated March 19, 1913, as such actual cost may be determined pursuant to such certificate, including modifications, reconstructions, improvements or betterments of existing structures of the Manhattan Railway Company to facilitate construction or use of said plant and structure under such certificate other than repairs, maintenance or replacements but not including replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of existing structures of the Manhattan Railway Company to facilitate the construction or use of said plant and structure or of said equipment under such certificate. \$11,771,387

(3) To pay the actual cost of plant and structure and of equipment of the extensions of lines of elevated railroads of the Manhattan Railway Company (leased to and operated by the Interborough Rapid Transit Company) under and pursuant to a certificate granted to said company and dated March 19, 1913, authorizing the construction, maintenance and operation of such extensions in conjunction with the existing Manhattan railroad and, through trackage agreements, in conjunction with parts of the municipal railroads specified in said certificate, as such actual cost may be determined pursuant to such certificate, including replacements, substations or renewals not due to wear and tear from operation and necessitated by the reconstruction of parts of the existing structures of the Manhattan Railway Company for the purpose of physically connecting the same with said extension 3,250,131

(4) To pay the cost of the improvements, recon-

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structions or changes to the power house, substations, transmission lines and electrical apparatus required in connection therewith now forming part of and supplying the lines of the existing Manhattan railroad (other than repairs, maintenance or replacements), which shall be necessary to provide additional power for the operation of the extensions (including trackage rights) and the additional tracks authorized by said certificates dated March 19, 1913, but including replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of said existing power house, substations, transmission lines or electrical apparatus to facilitate such purpose:

For such improvement.....	\$391,000
For such replacements so included, not exceeding	2,000,000
(5) For the expenses of the sale of the notes hereby authorized and to make up the discount or deficiency, if any, in the amount realized upon the sale to net not less than 95½ per cent of par of the notes sold for the purposes specified in subdivisions (1), (2), (3) and (4) of this paragraph of this section, to be applied <i>pro rata</i> for the purposes therein stated, not exceeding the sum of.....	1,773,720
	<hr/>
	\$39,416,000

Second. That all of the notes hereby authorized shall be amortized prior to the maturity of the said bonds securing the same out of the income of the Interborough Rapid Transit Company; provided, however, that such amortization may be effected through the operation of the sinking fund provided for by the terms of the aforesaid first and refunding mortgage dated March 20, 1913; and provided furthermore that all the notes or

bonds of which the proceeds are to be used to pay the cost of said replacements under authority of subdivision (3) of paragraph first of this section shall be thus amortized out of the income of the company and redeemed and cancelled by it in the manner and at the rate provided by the said mortgage; that no part of the sum set aside for the amortization of the said notes or bonds issued to pay the cost of said replacements shall be in any way charged against the city of New York or its share or interest in the income or earnings of the railroads under the provisions of the certificates hereinbefore referred to; and that no part of the said replacements or the cost thereof, when amortized as above provided, shall be credited to the capital account of the said company.

Third. That the said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the notes hereby authorized to be issued and on or before the twentieth day of each month the company shall make and file with the secretary of the Commission verified reports to the Commission stating the sale or sales of the said notes during the previous month, the terms and conditions of sale, the moneys realized therefrom and the use and application of said moneys toward the separate purposes specified in paragraph first above; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Fourth. In case any of the proceeds of the above-mentioned notes hereby authorized for the purposes specified in subdivision (1), paragraph first of section 3 of this order shall be expended by the said company and the amounts so expended or any portion thereof shall not be included in or made a part of the cost of equipment as finally determined pursuant to the said contract No. 3 referred to in subdivision (1), the company shall forthwith after such determination return to the fund derived from the issue of notes hereby authorized the amount not so included in any such determination.

Fifth. In case any of the proceeds of the aforementioned notes hereby authorized for the purposes specified in subdivisions (2) or (3) of paragraph first of section 3 of this order shall be expended by the said company and the amount so expended or any portion thereof shall not be included in or made a part of the actual cost as finally determined pursuant to the certificate described in subdivision (2) or subdivision (3), the company shall forthwith after such determination return to the fund derived from the issue of notes hereby authorized the amount not so included in any such determination. None of the proceeds of the aforementioned notes hereby authorized for purposes specified in subdivision (4) of paragraph first of section 3 of this order shall be expended by the said company for any of the purposes specified therein unless the company shall at least ten days prior to such expenditure file with the Commission a statement showing the estimate amount of such proposed expenditure and the application thereof, together with such plans or drawings as may be necessary to show the application and proposed use thereof. In case any of the proceeds of the aforementioned notes hereby authorized for the purposes specified in subdivision (4) of paragraph first of section 3 of this order shall be expended by said company and the Commission or the court on review of an order of the Commission shall determine that the amount so expended or any portion thereof has been expended for a purpose not specified in said subdivision (4) the company shall forthwith after such determination return to the fund derived from the issue of notes hereby authorized the said amount so disallowed.

Sixth. That at the time fixed in the said additional track certificate dated March 19, 1913, for the presentation to the Commission of a statement showing the actual cost of plant and structure and of equipment, the company shall file with the Commission a statement in writing setting forth in detail the cost of all property replaced or abandoned in connection with the improvements paid for out of the proceeds of notes hereby authorized or bonds authorized for the same purpose by the order of March 20, 1913, made in Case No. 1614.

Seventh. That nothing in this order shall prejudice any right otherwise possessed by the city of New York or the Commission (1) to object to any expenditure of proceeds of the notes hereby authorized or bonds authorized by the order of March 20, 1913, made in Case No. 1614, included in any statement required to be presented to the Commission pursuant to the additional track certificate or extension certificate dated March 19, 1913, or (2) to investigate further and to question and reject as a claimed credit or charge under the contract between the city of New York and the Interborough Rapid Transit Company, dated March 19, 1913, or the said certificates, any expenditure of proceeds of such notes, or any part thereof, even though claimed by the company to have been made for purposes specified in subdivision (4) of paragraph first of section 3 of this order or subdivision (7) of paragraph first of section 5 of the order of March 20, 1913, made and filed in Case No. 1614, except that as to the 70,000 kilowatt turbine proposed to be installed at 74th street power station referred to in the petition of February 19, 1917, the Commission approves the installation of such unit as being generally necessary, reserving, however, for such further investigation, the detail of expenditures for the purpose of installation and the extent to which such expenditures shall be deemed to have been made for purposes in the nature of replacements as aforesaid.

Eighth. That any sums accruing to the company, directly or indirectly, from interest on the deposit, or from the investment, of any proceeds of the notes hereby authorized shall be considered and accounted for as and as though a part of, but in addition to, the proceeds of the notes; provided, however, that this condition shall be without prejudice to any right or claim which the said company may otherwise have against the city of New York, or the city of New York may otherwise have against the said company, by reason of any obligation on the part of the said city or the said company under or pursuant to any provision of a certain contract dated March 19, 1913, between the city of New York, acting by the Public Service Commission for the First District, and the Interborough Rapid Transit Company, or

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under the additional track certificate or extension certificate dated March 19, 1913, hereinbefore referred to.

Ninth. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in derogation or limitation of any right and power otherwise possessed by the Commission to require a subsequent proceeding or by future order in this case, the amortization, reclassification of accounts or other suitable provision as to expenditures deemed to be for purposes in the nature of replacements or chargeable under the Public Service Commissions Law to operating expenses or income.

Tenth. That the authority hereby given to issue such notes hereby authorized shall apply only to notes issued by the said company on or before the 31st day of December, 1918.

Section 4. It is ordered, that this order take effect on the 23d day of July, 1918, and except as provided in paragraph tenth of section 3 of this order limiting the duration of the authority to issue such notes herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order, the said company shall notify the Commission whether the terms of this order are accepted and will be obeyed.

In the Matter of the Hearing on the Motion of the Commission on the Question of Improvement in and Additions to the Service, Equipment, Regulations and Practices of the STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, the STATEN ISLAND RAILWAY COMPANY, the RICHMOND LIGHT AND RAILROAD COMPANY, and the STATEN ISLAND MIDLAND RAILWAY COMPANY, in Respect to the Transportation of Passengers on Their Respective Lines in the Borough of Richmond, and Particularly to and from the Shipbuilding Plants, Other Industrial Plants, and Other Points of Governmental Interests or Activity

Case No. 2274

(Public Service Commission, First District, July 24, 1918)

Proceeding initiated by the Commission in relation to transportation corporations on Staten Island.

The purpose of this proceeding is to increase the important facilities of transportation on Staten Island and to make them both adequate and safe. While the questions herein considered deal more particularly with the conditions obtaining as to the electric lines the conditions of all the agencies of passenger transportation on the island are considered and passed upon in the opinion herein, upon which opinion the order is made. The improvement in and addition to the service, equipment, regulations and practices of the Staten Island Rapid Transit Railway Company and of other transportation corporations in the borough of Richmond passed upon in regard to the transporting of passengers on their respective lines, especially to and from the shipbuilding plants and other industrial establishments and points of governmental interest or activities. The effect of the unusual war-time demands and unprecedented costs of operation considered. The hearings herein cover two phases, to wit: the service furnished in transporting employees and others having business with the shipbuilding plants, and the safety, adequacy and suitability of the rolling equipment, the shop facilities and the inspection, repair and maintenance of the street railroads on the island. Order made.

KRACKE, Commissioner.—This proceeding concerns the adequacy and safety of the service and equipment of the street surface and steam railroads on Staten Island. For reasons here-

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inafter explained, this memorandum deals more particularly with the conditions obtaining as to the electric lines; but as to all the agencies of passenger transportation now available within Richmond borough, the conditions summarized in this opinion seem clearly to call for the immediate, affirmative and energetic action of the various public authorities, to the end that these important facilities of transportation may be speedily made both adequate and safe.

The conditions disclosed by this inquiry, initiated by the Commission upon its own motion, are such that the companies can hardly be expected to deal with all of them adequately, alone and from their own resources. The conditions are so unusual and the demands so emergent that the ordinary regulative powers of the Commission, under the applicable provisions and limitations of the State laws, can hardly avail to accomplish by compulsion all that is needed — matters which require most plainly the concerted and cooperate action of various public authorities. This memorandum has been prepared to summarize the conditions, and indicate the lines along which solution will of necessity proceed. In so far as the exercise of the powers vested in the Commission can avail, an order covering matters in that category is herewith recommended for adoption.

The transportation facilities on Staten Island have never been of an urban quality; and from the time when the amalgamation of Richmond county into the city of New York subjected the long hauls on the Staten Island lines to the five-cent fare limitation prescribed by the State laws applicable to inter-city transportation, the Staten Island surface railroad companies have been apparently denied the means of procuring the adequacy of revenues which is essential for permanent adequacy and sufficiency of service. Notwithstanding the fact that the conditions obtaining in many parts of Staten Island, as to distances, grades, volume of travel, and the like, are clearly suburban rather than urban in character, and do not lend themselves readily to the maintenance of the low, uniform rate of fare which the law has made the legal right of city dwellers, the incorporation of Staten

Island into the greater city has automatically operated to restrict the company to a rate of fare and basis of charge designed for much more compact areas, much shorter hauls, and much heavier traffic.

Not only have the companies found themselves confronted with the provisions of State laws prescribing the rate of fare chargeable for transportation within the limits of a single city, but they have voluntarily subjected themselves to more burdensome and less escapable limitations, in their quest for new franchises. From the statutory limitations, relief could be afforded by the action of the Commission; but the companies have bound themselves by fare provisions in franchise grants, from which relief may not be had without the consent of the franchise-granting authority, the city of New York. *Matter of Quinby v. Public Service Commission*, 223 N. Y. 229. In this respect, the Staten Island companies have, by their own action, placed themselves within the scope of what was said by this Commission on June 6, 1918, in the *Third Avenue Railway Company case* (St. Dept. Rep., Advance Sheet No. 96, p. 54):

"That many or all of these petitioning companies, and the 'System' which they make up, need additional revenue or diminished expenditure, during the abnormal period of high operating costs, we have no disposition to deny. It is a duty resting upon the proper public authorities, of which one instrumentality is this Commission, to secure to these companies an adequate rate for the service rendered — a rate which, if the volume of traffic be adequate, will yield a sum sufficient to maintain the service, preserve the property from deterioration, and reward the investors with a fair return, upon their outlay. But it may be pointed out that the difficulties of these companies are largely of their own creation. We do not refer now to the era of pyramid financing, gross overcapitalization, wasteful expenditures, and the payment of dividends at the expense of the upkeep of the property. All of those incidents of earlier management are still having their effects, although such offenses against safe investment and good service have now been ended by the enactment of the Public Service Commissions Law.

"The difficulties of these companies as to franchise terms are of their own seeking. It is a matter of public recollection and record that the franchises were not forced upon reluctant and unwilling companies by rapacious municipalities which overpowered their capacity for resistance. The companies, at the instance of their boards of directors and high officials, sought these and similar franchises, fare-limitations and all; they plotted for them, schemed for them, dickered for them, gave concessions and gained advantages, got something which they thought they wanted, something which they could capitalize and overcapitalize, long-term rights to use and occupy pivotal streets and avenues of the world's richest City. They gained favorable terms and for the sake of them accepted some terms which have now proved unfavorable, at least temporarily. But by the same legal concept (*People v. O'Brien*, 111 N. Y. 1) which has long denied the right of the municipality to impair or modify that franchise without the consent of the company, the company now finds itself unable to obtain a modification of a vital franchise term without the municipality's consent. The rule thus fairly works both ways, and the company has no right to expect that a Commission created for the purpose of determining the reasonableness of rates should serve to relieve the company from temporarily 'unprofitable terms' to which it perhaps 'ill-advisedly agreed' in order to obtain street rights which it deemed of priceless value. The Commission may well determine, under proper circumstances, what a company's rate or fare ought to be, but for release from a contract term, the company can hardly complain if it is required to repair to the municipality with which it made the contract. It was the company's solemn contract, not the Commission, which gave the municipality an essential part in the mechanism and procedure for any readjustment of the company's rates.

"By these companies' own choice, the local municipality has both a power and a responsibility, and no resort to a fragmentary plan of charging for transfers should avail to enable these companies now to avoid dealing with the municipality as

to the terms and conditions on which a modification as to fares will be permitted. The city may be unqualifiedly willing that an increased fare on all surface and rapid transit lines shall be temporarily charged; it may be willing to consent to such an increase in return for terms and concessions of present or future public advantage; or it may not be willing to release the companies from their contract obligation at all. The matter of terms rests with the municipality, because the companies wanted the franchise so much that they bargained on the subject of fare and agreed to be ever bound by a five-cent limitation, at the City's option. When the franchise limitations no longer stand in the way, the companies may come to the Commission for the fixation of a reasonable and adequate rate, notwithstanding statutory barriers."

EMERGENCY CONDITIONS AND WAR-TIME NEEDS

In ordinary times and under ordinary conditions, the operating factors, coupled with financial conditions inherited from past management, would make the providing of adequate and safe rolling stock, equipment and service on these Staten Island lines a difficult and continuing problem, demanding the earnest efforts of the officers of the company and the public authorities. Under the unusual war-time demands and in the period of unprecedented costs of operation, the continuance of service at all is becoming a real problem, because rolling stock and equipment are fast approaching a point where continuance of operation means the assumption of a very real risk of serious danger.

Since the United States entered the war, several great ship-building plants have been located on Staten Island, and other plants already in existence have increased their capacity many fold. Other industries and plants ministering directly to the efficiency of the United States in the war have come into being on Staten Island. A great base hospital has been built at Fox Hills. Encampments have been established and the personnel of coast defenses multiplied. The shipping industry has boomed along the waterfront, and the whole island has become little

less than a vital base depot for both the naval and military services of the United States and their accessory industries.

These conditions have, naturally and unavoidably, intensified the need for adequate transportation facilities for the permanent population of the Island, and, particularly, for the workers to and from these plants. The demands upon the facilities of the existing companies, by the increase of population and of industry, have been greater than ever before, and the already serious problem of service has been, and unfortunately has continued to be, a formidable one; and has engaged the attention of the companies, the Commission, the United States Shipping Board, and the National Railroad Administration.

THE POLICY OF THE COMMISSION WITH RESPECT TO PUBLIC UTILITY SERVICE IN WAR TIME

Even in the absence of these factors of special relationship to the all-important shipbuilding industry and the activities of the military and naval forces of the United States, the maintenance of adequate service on these lines, and the adoption of such measures as the emergency may make imperative to that end, would warrant the most earnest consideration and action of the Commission and other public authorities. In the Third Avenue Railway Company decision, already quoted from, this Commission made known its point of approach to this problem:

"This Commission has a very great interest, in behalf both of the travelling and investing public, in seeing to it that our transportation facilities are not impaired and crippled, because of a new and temporary disparity between revenues and war-time expenditures. The public cannot afford to let its transportation lines and their equipment go to rack and ruin during the war, because of the inadequacy of the earnings, under existing rates, to meet operating costs and enable proper upkeep of the corporate property used in the public service. The public cannot afford to have public utility revenues so far depleted, during an emergency period of several years, that even after due allowance has been made for the fact that in times like these all

individuals and corporations are having to bear a share of the common burdens, the conditions of public utility investment have become so unremunerative and unattractive as to make prohibitive the cost of money for new construction and to discourage capital from continuing in the public utility field. If transportation service in this City is to be continued on any efficient or enduring basis, during the war and afterwards, the proper public authorities must squarely face and act upon their responsibility for conserving the corporate income of essential utilities, even through the granting, where necessary, of proper applications for emergency relief during the war period."

THE STEAM RAILROADS AND THE FEDERAL RESPONSIBILITY

The steam railroad lines do not approach so closely the points at which shipyard workers may conveniently get on and off transportation lines as do the surface trolleys, which run past the doors of some of the principal plants. The steam railroads on Staten Island are owned and operated by the Baltimore and Ohio Railroad Company and are subsidiaries thereof. The Baltimore and Ohio Railroad Company is now under the control and operation of the Director-General of Railroads, for all purposes connected with the war, and thus the steam railroads of Staten Island are virtually under the same Federal control, or may readily be placed thereunder, if the Federal authorities find and feel that service inadequate for the increased war-time needs is being furnished.

In view of the fact that the Director-General of Railroads has justified his taking over of the intra-state and intra-city lines so largely on grounds related to adequacy and safety of service for workers in war industries, it has been felt by this Commission that the United States Railroad Administration and other Federal Departments might be relied upon to direct and carry out appropriate action for all necessary changes and improvements in the facilities and service, on the steam railroad lines of Staten Island. In a number of respects, to which reference will be made later herein, very substantial progress has been attained

along these lines, principally by the United States Shipping Board and the Emergency Fleet Corporation, mostly although not exclusively through the use of facilities of water transportation. To a degree this has tended to relieve the demand upon an already overburdened trolley system.

While the hearings were in progress, some rearrangements in the schedules and service of the steam railroads were instituted at the direction of the Commission, to facilitate the use of the steam railroads by shipyard workers. With these betterments the representatives of the United States Shipping Board and Emergency Fleet Corporation expressed satisfaction, and said that if further increases in service became necessary, they would again take the matter up with the Commission. This they have not done, and the steam railroads have hardly done their part to relieve the congestion on the one-track trolley-lines, already over-taxed beyond right and reason.

This memorandum will not undertake detailed comment upon the equipment and service of the steam railroads.

DESIRE TO LET THE SURFACE LINES WORK OUT THEIR OBVIOUS PROBLEMS

The decision herein promulgated has been held under advisement by the Commission for a time somewhat longer than the usual practice would have suggested, in the light of the facts disclosed by the present record. This has been done primarily for the reason that the Commission has felt that the difficulties and the deficiencies of the service, equipment, organization, and administration, of these street railroad companies are so obvious and flagrant, their menace to national interests and effectiveness so considerable, and their attempted solution through a mere coercive order under the Commission's regulatory powers so inadequate an approach to the problem, that an opportunity might well be given to see if, under the pressure of the national emergency, the responsible operating officials and directors of the companies would not adopt such corrective measures as, within a reasonable time, would result in a rehabilitation of the system

as an efficient instrumentality of service to the community which its franchise covers and as an aid to the National Government in facilitating transit to and from the industrial enterprises essential to the prosecution of the war. The Commission was inclined to feel that the managers of these street railroads might preferably be given considerable latitude in working out for themselves the best means for producing such results. Meanwhile, the Commission's staff has been observing the workings of the street railroads to discern whether the expectations of the Commission were being realized.

With the exception of additional cars for plant employees operated by laborers furnished, and in part paid, by the Government, and the installation of additional power-house generating equipment, the purchase of both of which have been or will be financed in large part by the Federal Government, the fundamental deficiencies in the equipment, plant and operation of this system which were revealed in the evidence given at the public hearings before the Commission and which prevent the furnishing of safe and reasonably adequate service and are fraught with dangers to the traveling public and a breakdown of the lines, still persist. As recently as July 11, 1918, the Electrical Engineer of the Commission called attention to

"The continued deterioration of the equipment of the Richmond Light and Railroad Company, which condition is not only increasing the danger of operation on the severe grades that exist on Staten Island, but is already seriously affecting the number of cars that the company is able to keep in operation.

"As a typical instance, on Monday, the eighth of July, out of a total of over 200 cars which the company should have available for operation, only 51 could be operated; 75 per cent could not be operated because of defects, or lack of necessary equipment for the same.

"If conditions are to continue, it will be only a short time when there will be practically a suspension of service on the surface lines of Staten Island."

The Commission, therefore, will now announce its decision

and enter such order as seems advisable, upon the basis of the record made in the proceeding had before it.

SCOPE OF THE HEARINGS

The hearings in this proceeding were instituted by the Commission in an effort, through ascertainment of fact and subsequent informal conference and advice, to bring about a co-operation between the public authorities and the company managers in improving the service and equipment to a standard conforming more nearly to the legal and franchise obligations of these companies. The hearings covered two phases:

(1) The service furnished in transporting employees and others having business with the shipbuilding plants; and

(2) The safety, adequacy, and suitability of the rolling equipment, the shop facilities, the inspection, repair and maintenance of the street railroads on Staten Island.

SERVICE SHIPBUILDING PLANTS

At the time of the beginning of the hearings in the early part of the present year, there were three large shipbuilding corporations operating on Staten Island, which operated plants at Port Richmond, Mariner's Harbor, Shooter's Island opposite Mariner's Harbor, and Arlington, with large forces of employees whose numbers were constantly growing and were to be increased as the work at the plants was being expanded to the enormous proportions now reached.

TRANSIT LINES

Of the four companies, two steam railroads and two electric railways, mentioned in the hearing order, the street railroads of the Richmond Light and Railroad Company and the Staten Island Midland Railway Company were the mainly used arteries of travel to and from the various shipbuilding plants. The Staten Island Rapid Transit Railway Company is a steam railroad and operates its North Shore Division from the ferry terminal at St. George to Arlington through Port Richmond

and Mariner's Harbor. The Richmond Light and Railroad Company is an electric street railroad, as is also the Staten Island Midland Railway Company, and operates the Elizabethport ferry line from the ferry terminal at St. George to the Elizabethport ferry through Port Richmond, Mariner's Harbor and Arlington. The trolley line which passes right in front of the entrances to the plants is patronized by most of the workers who shun the steam railroad on account of the distance to the station.

CAR HEADWAYS

Observations of the service of the Richmond Light and Railroad Company on the Elizabethport ferry line in October, 1917, and later in December, 1917, showed that the accommodations provided during the periods of travel to and from the shipyards were grossly inadequate. For example, on December 12, 1917, between 4:00 and 6:00 P. M. it was observed at Mariner's Harbor that the interval between cars bound toward Port Richmond ranged from fifteen to thirty minutes and that the overloading ranged from twenty to seventy on cars with a seating capacity of forty-three and there were twenty, forty-three and forty-five passengers in excess of seats on three cars having each a seating capacity of but twenty-six. During an observation at Port Richmond on December 13, 1917, between 6:00 and 7:00 A. M., of service toward Elizabethport Ferry, seven cars were operated with an overload of 12, 93, 77, 28, 16 and 69 per cent, and between 7:00 and 8:00 A. M. eight cars were operated with overloads of 16, 88, 93, 35, 54, 63, 58 and 35 per cent. This loading at Port Richmond Square made it impossible for intending passengers between that point and the shipbuilding yard at a distance of about two miles to secure accommodations, and a number of groups were observed unable to board cars.

At the time of the hearings, which were begun on January 22, 1918, and were concluded on May 2, 1918, the Richmond Light and Railroad Company had one hundred and thirty-two cars all told, of which forty-two were single truck closed winter cars, seventy single truck open summer cars, and twenty double

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truck open summer cars. The number of cars then owned by this company was not sufficient adequately to accommodate the service on Staten Island during the winter time. Any increase in the service on this line would have meant, according to the company officials, the curtailment of the meagre and often inadequate service ordinarily afforded on other lines of the company. The Commission, while desirous of having all the service possible afforded to the shipyards, hesitated to direct the company to place more cars on the Elizabethport ferry line to the detriment of the service on the other lines of the company. A conference was held with the interested parties to devise ways and means of meeting the situation. As a result, ten additional closed cars were put in operating condition and placed in service during the morning and evening rush hours on the Elizabethport ferry line as well as two trippers between Port Richmond and the shipyards. The trippers made four trips in the morning rush hours and a corresponding number of trips in the evening rush hours. The service as augmented, while not entirely satisfactory, was a decided improvement and met the approval of the Shipping Board and officials of the shipyards. The railway company stated that it expected to be able to accommodate the travel to and from the shipyards during the summer, as it had considerable more summer than winter cars.

The hearings in regard to car headways and the number of cars operated were suspended for a time in order that, by conference between representatives of the Commission, the companies and the Shipping Board, arrangements might be devised for furnishing additional cars to provide special accommodations to and from the shipbuilding plants and for employing crews to operate the cars. It became apparent that in so far as the special needs of the shipbuilding plants demanded the operation of a substantially larger number of cars for the rush periods of travel, the companies would require the aid of the Federal government in purchasing additional cars and employing the crews to operate them. This assistance, I am informed, has already been extended in a measure to justify the expectation

that so far as the number of cars are concerned, the company should have a sufficient number to provide much greater accommodations to the ship plant employees and to relieve the acute congestion of travel on the transit lines serving the shipbuilding plants.

TRANSFERS AT JEWETT AVENUE

In the course of the hearings before the Commission, the fact was developed that an improvement in the handling of the transportation of shipyard workers and other employees between intra-island points could be secured if transfers were required to be exchanged, between the cars of the Elizabethport ferry line of the Richmond Light and Railroad Company and the Port Richmond-Concord line, the Port Richmond-Silver Lake line and the Richmond-St. George line (via the Port Richmond-Concord line) of the Staten Island Midland Railway Company, at Richmond terrace and Jewett avenue. As to many of the persons employed along the Kill von Kull, a new transportation route and facility could be made available, for a five-cent fare, through the establishment of this transfer privilege, without subjecting the companies to the necessity of placing on a five-cent fare basis the "long haul" of New Jersey residents boarding the Staten Island surface lines at Elizabethport, for carriage to and from Midland Beach, on Saturdays, Sundays and holidays. A proceeding for the requiring of this exchange of transfers was accordingly started, and by an order made by the Commission in Case No. 2281 on April 8, 1918, as amended by order made on April 30, 1918, the establishment of this transfer exchange was directed. The transfer arrangement has since been in effect, and has worked well, in reducing congestion to some degree and in giving a more direct route of travel to many persons for a single fare.

EQUIPMENT AND MAINTENANCE

As was said at the outset of this memorandum, the scope of the Commission's investigation embraced not only the problem of emergency service for shipyard workers, but also the practices and system of the street railroad company in the maintenance

of its equipment. The inspections, made by or under the direction of the electrical engineer of the Commission, of the rolling stock of the Richmond Light and Railroad Company and the Staten Island Midland Railway Company, showed such deterioration in the physical condition of car equipment and such neglect in its maintenance as to diminish the operating efficiency of cars and to threaten serious interruptions in traffic. The obligation of the companies to maintain their rolling equipment and roadway in a safe operating condition admits of no half-way measures and no disregard of continuous derelictions. The dangers inevitable from any failure to perform this obligation casts upon directors and managers of these corporations a responsibility which appears to have been too lightly borne in the past, and which the Commission and other public authorities should insist shall now and hereafter be fully discharged.

The inspections made by the Commission's engineers and reported in detail upon the hearings covered more particularly: (1) Shop facilities, (2) overhauling and inspection, (3) flat wheels, (4) wheelguards and fenders, (5) cars, (6) records and (7) power plant.

SHOP FACILITIES

A thorough investigation was made by inspectors of the Commission in the latter part of April, 1918, of the shop facilities and conditions in the car barns as well as the general condition of the rolling stock of the companies. The companies have two barns,—The Concord barn and the Brook street barn. The Concord barn is used practically as a storage shed at which none but minor repairs are made, inasmuch as the companies have no facilities there for repairs or any machinery or machine tools. One man was assigned to this barn during the day and only a watchman was kept there during the night. The man on day work confined his activity to making small repairs and answering "wrecker" calls. At the Brook street barn the facilities for the overhauling and repair of cars are much larger, but are entirely inadequate. There seems to be no system of overhauling or inspection, and no records have been kept, showing the gen-

eral repairs made to the cars. There is no record kept of cars withdrawn from service as defective. The vice-president and general manager of the companies admitted on the witness stand that the repair shop was obsolete and that a modern shop with modern appliances was needed; that such improvements were contemplated and that land had actually been purchased for that purpose. The facilities and method now in vogue in the shops of the companies should be improved by providing additional machine tools, wood-working machines, facilities for raising car bodies and for rewinding and testing armatures and field coils, and suitable apparatus for testing circuit breakers. Repairs should also be made to the inspection pits so as to keep them free from water at all times, and the pit should be electrically lighted, so as to enable workmen properly to make inspections and repairs to cars.

OVERHAULING AND INSPECTION

The modern practice of street railroad companies is to inspect and overhaul their cars on a mileage basis, that is to say, after a car has been operated a certain number of miles, it is as a matter of course, taken into the barn for inspection, and all parts are gone over to determine its condition and to make repairs, if necessary. Such an inspection and overhauling are considered a reasonable and necessary precaution to secure a safe operation. The hearing and investigation of the Commission disclosed that the companies have no rule or regulation as to the frequency of inspection, based upon car mileage or otherwise. No records are kept to show repairs to cars, and there is no way in which the companies can tell when any certain car was inspected, and it is thus possible that some of the cars run indefinitely without inspection. There appears to be no habitual lack of most of the needful materials on hand, but the mechanical staff is small and unable properly to handle the repair and overhauling work. For the dearth of labor, the present war conditions undoubtedly are responsible, in some measure. The company's so-called mechanics were really unskilled laborers and did not meas-

ure up to the jobs they held. The entire system of management at the shops was found to be crude, primitive and inefficient. Very little work appears to have been done at the barn during the night, and while the cars seem to have been inspected, no repair work appears to have been performed. A system of overhauling and inspection should be put into effect immediately by the companies. The bad condition of the rolling stock makes it absolutely necessary that the cars be completely and thoroughly overhauled, such overhauling to cover the car bodies, trucks, motors, controllers, resistance, circuit breakers, wiring, brake equipment, wheelguards, fenders, sand boxes and all other electrical and mechanical equipment. The overhauling should consist of the dismantling or taking apart of all equipment and the renewal of all defective or excessively worn parts. The scarcity of labor at the present time may prevent the carrying out of these improvements within a very short time, but there is no doubt in my mind that the danger to which the traveling public is now subjected because of the defective conditions of the cars makes it imperative that cars be overhauled and fully repaired each day until all of the rolling-stock has been put in first class operating condition. The open cars should be attended to first, the summer season being well under way. A system of inspection and overhauling of rolling stock on a mileage or periodic basis should be inaugurated immediately and maintained, and an accurate record be kept of inspections and repairs made.

FLAT WHEELS

Many complaints were received by the Commission concerning flat wheels on the cars of these companies and the bumping and jarring noises resulting therefrom. This matter has been called to the attention of the companies many times. The companies have no wheel-grinder, wheelpress or boring machine at their barn and the result has been that when the wheels become slightly flat, they were allowed to remain in the service until their condition became so bad they had to be removed. The companies have advised the Commission that they were experi-

encing great difficulty in obtaining the wheels. An inspection at the Brook street barn disclosed 50 pair of new wheels of various types which could be used to replace the flat wheels then in service. These wheels had been at the barn for sometime and yet, when I personally made an inspection trip with some of the Commission's staff on Staten Island while the hearing was in progress, a considerable number of the cars in service had flat wheels and made loud and jarring noises. It would appear, therefore, that the failure to put the wheels on the car trucks and not a deficiency in their supply was the real reason for the use of flat wheels in the service.

WHEELGUARDS AND FENDERS

The Commission in Case No. 1049 adopted an order requiring street railroad companies to equip all their cars in service, except those operated by animal power, with a fender and wheelguard at each end of the car of a type to be approved by the Commission and the companies were directed thereafter not to put in service any cars, except those operated by animal power, until they shall have been equipped with such fenders and wheelguards. The companies were further required to maintain all of such fenders and wheelguards in good operating condition. The types of fenders and wheelguards were submitted to and approved by the Commission and the cars were equipped as provided in the order, but the companies have failed to keep the fender and wheelguard at each end of all the cars and to maintain the fenders and wheelguards that are on the cars in good operating condition. The reports of the Commission's inspectors, placed in evidence at this hearing, demonstrate that the companies have disregarded the terms of the Commission's order. The attention of the companies has been called on several occasions to their failure to comply with the terms of the order, as appears from exhibits placed in evidence, but the Commission's warnings have not been observed.

At the hearing, evidence was introduced concerning several accidents which show the importance of compliance with this

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order of the Commission. One of the accidents occurred at Lincoln avenue and Richmond Hill road on March 12, 1918, in which a child was struck by a car and killed, the wheel of the car passing over the child's body. The report of the accident shows that both wheelguards on the car, one on the front, and one on the back, were tied up with rope, and the projecting fender on the front end was also tied up.

Another accident happened at Morning cross road opposite Bainhurst Cemetery on November 20, 1916, in which an unknown man was run over and killed. The report of the accident shows that the wheelguards had been removed and snow scrapers installed in their place and that the fender was at a higher distance above the rail than provided in the order.

On April 1, 1918, a car operating on the Elizebethport ferry line struck a boy at Herberton avenue, knocked him down, and the front trucks passed over him, resulting in his death. This car was noted in operation, about thirty minutes before the accident, by one of the Commission's inspectors, with a wheelguard missing at one end of the car and the wheelguard at the other end tied up and consequently inoperative. The orders which I recommend for entry will contain provisions for the rehabilitation of the wheelguard and fender equipment of the cars.

The companies have asserted that the defective condition of the wheelguards and fenders is due to high pavement resulting from frost in the ground and that during the snowy weather wheelguards and fenders were hooked up to prevent their breaking and doubling under by snow. Under section 178 of the Railroad Law they are required to keep in permanent repair that portion of streets, avenues and public places between their tracks, the rails of their tracks and two feet in width outside of their tracks. The law requires this work to be done under the supervision of the proper local authorities, and in case of the neglect of the companies to perform the work, the local authorities may and should make the repairs, at the expense of the corporations.

NUMBER OF CARS

The Richmond Light and Railroad Company, at the time of the hearing, had a total of one hundred and thirty-two cars, as follows: Forty-two single truck closed winter cars, seventy single truck summer open cars and twenty double truck open summer cars. The Staten Island Midland Railway Company had eighty-nine cars as follows: Thirteen single truck closed winter cars, forty single truck open summer cars, four double truck open summer cars and thirty-two double truck closed steel winter cars. One hundred and forty-five of these cars were inspected by the Commission's inspectors in the latter part of April (the reports indicate one hundred and seventy-one, but twenty-six of the cars were twice examined by inspectors). All of the cars inspected were in need of repairs and many of them were unfit for service, having many defects which constituted a source of danger to the passengers and employees of the company. Truck and motor conditions were decidedly bad. On a large number of cars the motor shells were separated, due to loose bolts, and on many of the cars the lower half of the motor shell was carried entirely by two bolts instead of four. The gear cases were missing on many cars and the dry condition caused thereby has resulted in some of the gears becoming partly stripped and not meshing properly. The cars are equipped with both air and hand brakes, but the investigation shows that the hand brakes were generally in bad condition and apparently were not used by the motorman. The usual practice of street car companies is to designate certain parts of the routes on which the hand brake is to be used and in that way the hand brakes are kept in an operating condition. An inspection was made nightly of cars in the Brook street barn but there seems to have been no test made or any systematic method followed in the maintenance of the brakes, either hand or power. The hand brakes did not appear to be used, going down grade or otherwise. The company seems to have had sufficient material on hand to make ordinary repairs. The mechanical staff of the companies at the Brook street barn is inadequate to care for the necessary and

needed repairs to the cars. The companies have failed to properly maintain and keep their cars in proper operating condition. The officials of the companies stated that they had made efforts to purchase cars, but that the exorbitant price demanded even for second-hand cars had prevented the acquisition of needed rolling stock. The company purchased steel cars three years ago, these being the last cars acquired prior to the time of the hearing, and the investigation discloses that due to lack of proper repair and maintenance, even they were in very bad condition.

RECORDS

The evidence discloses a total lack of any system of records of repair and overhauling of cars. An accurate record of inspection, overhauling and repairs should be made and kept available. The vice-president and general manager on the stand testified that at one time two books were kept showing the various work performed at the barns, but upon the induction of a new master mechanic some time ago, the latter suggested a change from the books to a card system and that the repairs to cars were shown on the cards. Some of the cards were introduced in evidence and taken in connection with the examination of the master mechanic it developed that the card index system had not been lived up to and, as a matter of fact, the new master mechanic has neither made nor caused any notation to be made on any cards of any repairs during his regime. He merely kept notes on slips of yellow paper taken from a pad, and there was nothing to indicate that even these were accurate. The companies should be required to keep a current record of each car so as to show readily at all times when the car was inspected and overhauled, the mileage run between inspections, the repairs made in connection with each periodic overhauling, also the minor or emergency repairs made between inspections. The form of the records, before being finally adopted, should first be submitted to the Commission for approval. Suitable records should also be kept of repairs made to equipment in the power house and substations, and of other important equipment; and the forms before being adopted, should first be approved by the

Commission. The primary need of these records is to assure safe and adequate service. The companies should have a simple, systematic record of motormen's daily reports and emergency repair records.

POWER PLANT

Testimony presented at the hearing shows that the power plant of the Richmond Light and Railroad Company at Livingston, which furnishes the electrical energy for operating the street railroad cars and for light and power purposes of the community, is not equipped with sufficient capacity to enable the company to render reliable service. Two of the units (one of 400 kilowatt and another of 800 kilowatt) are old reciprocating engines which have not been operated for some time past, and are not in a condition which will enable them to be put in operation. Therefore they are not to be considered as being available for use. At the time the electrical engineer of the Commission made the investigation reported by him on the hearing, the largest unit in the station, rated at 7,500 kilowatt hours, was out of commission for necessary repairs, but has since been returned to the service. The smaller units were not in first class condition, and the service at the station is far from reliable. The Richmond Light and Railroad Company has made arrangements to increase its capacity by the installation of an additional unit.

CONCLUSION

I am of course reluctant to criticise the efforts of executive and operating officers of a public utility in respect to administration, upkeep of the property, and operating efficiency. I am likewise loath to comment unfavorably upon those responsible for the fiscal policy of the company and the withholding of the funds necessary to maintain the property as an efficient, safe, and possibly profitable facility of transportation. I fully realize, as to these companies, the practical conditions which I have recounted, the trying situation of the operators of these street railroads during the stress of war conditions, and the difficulties which have beset their path.

At the same time, I cannot avoid a feeling that the deplor-

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able and dangerous conditions disclosed by the evidence in this proceeding are due in considerable degree to the failure of these companies to comprehend the responsibilities resting upon them under the obligations of their franchises, and their failure, more recently, to recognize that the emergency conditions arising out of the use of their lines for the carriage of workers to and from the most essential of war-time industries made action on their part to measure up to the needs of a patriotic duty, task and opportunity, of the first magnitude. They have not shown a capacity or a disposition to act energetically and broad-mindedly, as would be necessary to cope with the situation. The companies have utterly failed to keep their equipment in safe and efficient operating condition, and I am obliged, therefore, to recommend to the Commission the adoption of orders requiring these companies suitably to overhaul their equipment and place the same, as quickly as possible, in safe and efficient operating condition.

The National Government, the establishment of war-time industries on Staten Island and the unprecedented demand upon facilities and service of the companies, are responsible in considerable measure for the present plight. In a number of respects, very substantial progress has been made, principally by the United States Shipping Board and the Emergency Fleet Corporation, in the direction of increasing transportation facilities for shipyard workers. This has been done, however, mostly although not exclusively through the use of facilities of water transportation. To a degree this has tended to relieve the demand upon an already over-burdened trolley system, but it has not met the issue whether a break-down and cessation of service on these Staten Island surface lines would be compatible with the public interest in this time of war.

ADDITIONAL TRANSPORTATION FACILITIES FOR STATEN ISLAND SHIPYARDS

Among the improvements which have been brought about, or are under way, are the following:

(1) The Emergency Fleet Corporation on February first provided the steamer *Highlander*, running from the Battery to the

Standard Shipbuilding Company's plant on Shooters Island, carrying shipyard workers direct from the Battery to the Island. Otherwise these workers would be obliged to use the Municipal Ferry to St. George, then use either a street car or the steam railroad. This steamer is now carrying about 2,200 passengers each way daily.

(2) About May first, the steamer *Ursula* was put in service between Thirty-ninth street, Brooklyn, and Shooters Island, thus relieving the local transportation lines on Staten Island. This boat has capacity of 550.

(3) On June tenth, the steamer *Taurus*, with a capacity of 1,500, was placed in operation from the Battery to Staten Island and Downey shipbuilding plants. This steamer now carries about 1,100 each way daily. This also tends to relieve the local transportation lines on Staten Island.

(4) The shipbuilding companies are furnishing twelve crews, night and morning, for the operation of "tripper" cars, in addition to the service formerly furnished by the Richmond Light and Railroad Company, and the Fleet Corporation is paying the difference in wages between the street railway rate and the shipyard rate. This additional service was started about May fifteenth.

The Emergency Fleet Corporation is providing the following additional facilities:

(a) A contract is practically ready for signature covering the advancement of over \$600,000 to the Richmond Light and Railroad Company for

1. The purchase and installation of a 10,000 kilowatt turbine unit with auxiliary equipment.

2. The purchase of twenty double truck cars.

3. Additions to the feeder system.

(b) The installation of sidings for the storage of "tripper" cars to be operated by shipyard workers.

(c) Arrangements have been made for the operation of a steamboat, with a capacity of 1,500, from Sixty-ninth street or Thirty-ninth street, Brooklyn, to the plants of the Staten Island Shipbuilding and the Downey Shipbuilding Companies. This will be placed in service within a few days.

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(d) Arrangements are being made for the operation of special train service by the Staten Island Rapid Transit Company from Tottenville, at the southern extremity of Staten Island, up the east coast and directly to the shipyard plants. The Fleet Corporation is to guarantee the minimum cost per day for the operation of this train.

Aside from the measure of Federal responsibility, I am of the opinion that the municipal authorities of the city of New York have a responsibility for such action as will see to it that necessary transportation service for this great borough is not crippled, rendered intolerable, or destroyed altogether, by interposing too long and too inexorably a barrier to such an advance in fares as may be found necessary to secure to these companies a revenue sufficient to permit the rendering of an adequate service. The provisions of the company's municipal franchises give the city a right to consent or refuse; the withholding of an adequate revenue may bring ruin to the whole borough and disaster to governmental projects within its area. Into all of the other boroughs, the city has put millions of its money, to assure splendid facilities of rapid transit, at a low, uniform fare. In Richmond borough alone, the city has spent no money for rapid transit, and has done nothing from its treasury to keep the fare to the five-cent figure. Failing to aid Richmond thus as other boroughs have been and are being aided, the city may well consider whether it should also bar the way to such a slight advance in fares as would ensure the upkeep of the property and the continuance of safe service. There are many indications that the people of the borough would gladly pay a slightly increased fare, at least during the war period, if only better service could thereby be secured and assured. Of course, enforceable assurance of radical betterments in service should be conditions of any change in fare.

What the Commission can do at this time is represented by the order herewith recommended for adoption.

In accordance with the foregoing opinion the Commission, on the same date, made the following order:

BY THE COMMISSION.—A hearing having been had in this proceeding by and before the Commission, on January 22, April 29, and May 2, 1918; and W. F. Wilmoth and Captain C. S. Bookwalter appearing for the United States Shipping Board, H. C. Kendall appearing for the Emergency Fleet Corporation; R. L. Rand, vice-president, and Bertram G. Ladie appearing for the Richmond Light and Railroad Company and the Staten Island Midland Railway Company, R. H. Neilson appearing for the Staten Island Rapid Transit Railway Company and Staten Island Railway Company, W. Wirt Hills appearing for the Staten Island Civic League, L. L. Tribus appearing for the Staten Island Chamber of Commerce, and William L. Ransom, counsel, and Jacob H. Goetz and Robert J. Farrington, assistant counsel, attending for the Commission; and the Commission being of opinion, after such hearing, that the regulations, practices, equipment and appliances of the Richmond Light and Railroad Company and the Staten Island Midland Railway Company in respect to the transportation of passengers, are unsafe, improper and inadequate, and that the additions, repairs and improvements to the rolling stock and equipment of said companies, hereinafter specified, ought reasonably to be made, in order to promote the security and convenience of the public, and in order to secure adequate service and facilities in the transportation of passengers.

Now, therefore, it is ordered: (1) (a) That the said Richmond Light and Railroad Company and the Staten Island Midland Railway Company be, and they and each of them hereby are, required and directed completely and thoroughly to overhaul the cars respectively used by them for operation, to wit:

RICHMOND LIGHT AND RAILROAD COMPANY

Forty-two single truck closed cars Nos. 100 to 104 inclusive, and 106 to 142 inclusive.

Seventy single truck open cars Nos. 1 to 70 inclusive.

Twenty double truck open cars Nos. 71 to 90 inclusive.

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STATEN ISLAND MIDLAND RAILWAY COMPANY

Thirteen single truck closed cars Nos. 150 to 153 inclusive, and 156 to 163 inclusive, and 165.

Forty single truck open cars Nos. 200 to 239 inclusive.

Four double truck semi-convertible pay within cars Nos. 166 to 169 inclusive.

Thirty-two double truck closed steel cars Nos. 300 to 331 inclusive.

And in accordance with the work schedule required to be fixed by the respective companies with the Commission pursuant to the provisions of paragraph (1) subdivision (b) of this order, such overhauling to cover car bodies, trucks, motors, controllers, resistance, circuit breakers, wiring, brake equipment, wheelguards, fenders, sand boxes, and all other electrical and mechanical equipment and such overhauling to consist of the dismantling and taking apart of all equipment and the renewal or replacement of all missing, defective or excessively worn parts.

The work of overhauling herein directed to be performed by the Staten Island Midland Railway Company shall be so prosecuted that of the thirty-two double truck closed steel cars Nos. 300 to 331, inclusive, and the four double truck semi-convertible cars Nos. 166 to 169 inclusive, and the thirteen single truck closed cars Nos. 150 to 153 inclusive and 156 to 163 inclusive and 165, three shall be completed with the exception of the necessary painting, by September 7, 1918, and three each week thereafter, including necessary painting, until December 21, 1918. Thereafter the Staten Island Midland Railway Company shall prosecute the work of overhauling its forty single truck open cars Nos. 200 to 239, both inclusive, so that three thereof shall be completed by December 28, 1918, and three thereof each week thereafter until all of such single truck open cars are completely and thoroughly overhauled as herein directed.

The work of overhauling herein directed to be performed by the Richmond Light and Railroad Company shall be so prosecuted that of the forty-two single truck closed cars Nos. 100 to 104 inclusive and 106 to 142 inclusive, three shall be completed,

with the exception of necessary painting, by September 7, 1918, and three each week thereafter, including necessary painting, until December 7, 1918. Thereafter the Richmond Light and Railroad Company shall prosecute the work of overhauling its seventy single truck open cars Nos. 1 to 70 inclusive, and its twenty double truck open cars Nos. 71 to 90 inclusive, so that five shall be completed by December 14, 1918, and five each week thereafter until all of such open cars are completely and thoroughly overhauled as herein directed.

The work of overhauling herein directed shall be commenced by each of said companies respectively within five days after the service of this order and shall be prosecuted from day to day until all of the rolling stock of each company has been put into first class operating condition as above directed.

No closed or semi-convertible cars shall be operated by the Staten Island Midland Railway Company for the transportation of passengers after December 21, 1918, and no closed cars shall be operated by the Richmond Light and Railroad Company after December 7, 1918, that have not been overhauled as herein required, and no open cars shall be operated by either company after April 15, 1919, that have not been overhauled as herein required, such overhauling to be certified to by the Commission or its electrical engineer.

(b) The said companies are hereby each required and directed to file with the Commission not later than August 12, 1918, a schedule of the work proposed to be done by such companies in carrying out the terms of this order, to the end that the Commission may approve or disapprove such schedule in whole or in part and require a different schedule to be followed in respect to all or any part of said overhauling, such schedule to set forth the type of cars, the number of each series and type of cars to be overhauled in accordance with the terms of this order during a stated period of time within the time fixed by this order for such overhauling.

(2) (a) That the said Richmond Light and Railroad Company and the Staten Island Midland Railway Company be and

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they hereby are each required, beginning within five days after service of this order, and in accordance with the work schedule required to be filed by the respective companies with the Commission pursuant to the provisions of paragraph (2) subdivision (b) of this order and within the respective periods of time set forth in such work schedule, to make such repairs, improvements, changes or additions to the property, construction, apparatus, equipment and facilities at their shops, by providing such additional machine tools, wood working machines, facilities for raising car bodies and for rewinding and testing armatures and field coils and suitable apparatus for testing circuit breakers as will enable each of said companies and place them in a position severally, properly and promptly to carry on and perform the overhauling required and directed in paragraph (1) of this order and thereafter to inspect and overhaul cars operated by them respectively; and said companies and each of them are hereby further required and directed to install such necessary wiring and apparatus for electrically lighting the inspection pits at their Brook street barn and make such repairs to such inspection pits as shall be necessary to keep them free from water at all times.

The said Richmond Light and Railroad Company and the Staten Island Midland Railway Company or either of them may in lieu of making the repairs, improvements, changes or additions to the property, construction, apparatus, equipment and facilities at their shops, set forth in paragraph (2) (a) make necessary arrangements with other persons, associations or corporations or provide the necessary facilities elsewhere as will enable each of said companies and place them in a position severally, properly and promptly to carry on and perform the overhauling required and directed in paragraph (1) of this order and thereafter to inspect and overhaul cars operated by them respectively.

(b) The said companies are hereby further required and directed to submit to this Commission not later than August 12, 1918, a statement and work schedule of such repairs, improvements, changes or additions proposed to be made in carrying out the terms of this order or the arrangements proposed to be made

in carrying out the terms of the order or both, which shall set forth the shop or shops at which the same will be provided, the specifications of each such repair, improvement, change or addition and the time within which the same will be provided, to the end that the Commission may approve or disapprove such schedule or arrangements in whole or in part and require a different schedule or arrangements to be followed in respect to all or any part of such repairs, improvements, changes or additions.

(3) (a) That the said Staten Island Midland Railway Company be and it hereby is prohibited after December 21, 1918, from operating any of the thirty-two double truck closed steel cars Nos. 300 to 331 inclusive, or the thirteen single truck closed cars Nos. 150 to 153 inclusive, and 156 to 163 inclusive, and 165, that have not been overhauled as directed in paragraph (1) of this order; and the said Staten Island Midland Railway Company be and it hereby is prohibited from operating any other of its forty single truck open cars referred to in paragraph (1) of the order after April 15, 1919, that have not been overhauled as required by paragraph (1) of this order.

(b) That the said Richmond Light and Railroad Company be and it hereby is prohibited from operating after December 7, 1918, any of its forty-two single truck closed cars Nos. 100 to 104 inclusive, and 106 to 142 inclusive, that have not been overhauled as directed in paragraph (1) of this order; and the said Richmond Light and Railroad Company be and it hereby is prohibited from operating any of its single or double truck open cars referred to in paragraph (1) of this order after April 15, 1919, that have not been overhauled as required by paragraph (1) of this order.

(4) That the said Richmond Light and Railroad Company and the Staten Island Midland Railway Company be and they hereby are required and directed on or before September 1, 1918, to put into effect and thereafter to continue to maintain a system of inspection and overhauling of their rolling stock on a mileage or periodic basis, and to keep a current record of each car so as to show readily at all times when the car was inspected and

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overhauled, the mileage run between inspections, the repairs made in connection with each periodic overhauling, also the minor or emergency repairs made between inspections. The companies are hereby further required and directed on or before August 12, 1918, to submit to the Commission a statement of the proposed system and copies of the proposed forms of records prior to their adoption and installation to the end that the Commission may approve or disapprove such system or forms of records either in whole or in part and require a different system or forms of records to be filed in respect thereto. This paragraph of the order shall not be deemed to require any change in the uniform system of accounts prescribed by the Commission for said street railroad companies.

(5) That the said Richmond Light and Railroad Company and the Staten Island Midland Railway Company be and hereby are required and directed on or before September 1, 1918, to install and thereafter maintain adequate and proper records of repairs made to equipment in their or either of their power houses and substations, and all other important equipment, and to submit to the Commission copies of the proposed forms of such records prior to their adoption and installation to the end that the Commission may approve or disapprove such forms of records in whole or in part and to require a different form or forms of records to be filed in respect thereto; and it is

Further ordered, That this order shall take effect forthwith and shall continue in effect for a period of two years from the date of this order, and that within five days after service of a certified copy of this order the Richmond Light and Railroad Company and the Staten Island Midland Railway Company shall notify the Commission whether the terms thereof shall be accepted and will be obeyed; and it is

Further ordered, That this order shall be without prejudice to the making of any other or further order with respect to any matter covered by the order for hearing herein or the proceedings thereon.

In the Matter of the Hearing on the Complaint of MRS. H. J. CARROLL against the KINGS COUNTY LIGHTING COMPANY as to Refusal to Refigure Bills for Gas Supplied to Premises at 1160 Forty-first Street, Borough of Brooklyn, City and State of New York, and as to Discontinuance of Supply of Gas

Case No. 2287

(Public Service Commission, First District, July 24, 1918)

Gas meters recognized as standards for gas measurement.

The complainant herein was a customer of the Kings County Lighting Company, which said corporation rendered to her a bill which she refused to pay on the ground that the meter was incorrect, and upon her failure so to do the supply of gas was cut off. The case having been brought before the Commission for determination an inspector of the Commission upon reading the meter found it to be 23.46 per cent fast. The company, however, refused to refigure the gas bills upon the said premises, and make proper adjustments, claiming that while it admitted the fast registration the latter had been caused by tampering with the meter but does not claim that the complainant had anything to do with or any knowledge of such tampering. Employees of the company testified that they found water in the meter and that after throwing out this water the meter worked correctly. *Held*, that gas meters are accepted as recognized standards for measuring gas and that there was a possibility that there was a leak in the gas pipe in the house walls or that an unlighted gas jet in some obscure place was turned on, and that under all the circumstances adequate relief to the complainant would be granted if the rebate already allowed for the fast meter be permitted to stand as an adjustment of the matter. Order of discontinuance entered and complaint dismissed.

HERVEY, Commissioner.—The Commission called a hearing in this case after the Kings County Lighting Company had signified its unwillingness to refigure gas bills based upon readings of the meter upon the complainant's premises and make proper adjustment, although the meter when tested by the Commission's gas inspector on March 26, 1916, in the company's repair shop, had been found to be 23.46 per cent fast. The company admits the excessively fast registration but claims it

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was caused by a tampering with the meter. After complainant had failed to pay a bill amounting to about sixteen dollars covering the period from December 7, 1917 to March 8, 1918, her gas supply was discontinued on March 12, 1918. Pending a determination of the matters in dispute, the Commission requested the company to turn on the gas, which was done after Mrs. Carroll had paid nine dollars and sixty-seven cents, representing the amount which the company claims she would owe were a rebate allowed because of the fast registration.

Complainant with her family lives, and for over three years has been living, in the upper apartment of the two-family house, No. 1160 Forty-first street, borough of Brooklyn, and during that time has been one of the company's customers. The lower apartment, consisting of the first or parlor floor and basement, was vacant from about November 1, 1917, to the following March fifteenth, during which time the furnace which heats the lower apartment had not been in use. During the winter months complainant has been heating her apartment with coal and oil stoves, using for most of that time one of the coal stoves for cooking purposes. Complainant testified that the gas supply ceased on Christmas Eve of last year and that she was actually without gas until after two of the company's employees had called on February 8, 1918, and remedied conditions. She notified the company of her inability to get gas on at least five or six occasions between Christmas Eve and February seventh. The company's records showed that its men had been sent to attend to the matter on January twenty-fifth and February thirteenth, but were unable to obtain access to the premises and that it was not until February fourteenth that they reported that they had on that day entered the premises and found water in the meter. According to the testimony of these men neither the meter nor the service pipe to it was frozen. There is a sharp discrepancy in the testimony as to whether the complainant had any gas supply at the time the company's employees called to fix the meter. The husband and daughter of Mrs. Carroll corroborated her testimony that they were unable to get any gas at all from Christmas Eve to February eighth, although the mem-

bers of the family had tried to light the gas on numerous occasions but without success. The men who emptied the meter of water testified that they called about noon on February fourteenth and were able to get a flame from the gas jet in complainant's apartment before they went into the cellar and before they actually touched the meter.

The meter, which had been installed on December 23, 1916, appears to have been regularly read and to have registered as follows, including the period when complainant claims she had no gas:

Date	Index cu. ft.	Consump- tion cu. ft.	Amount of bill
December 7, 1917.....	34,200	3400	\$3 23
January 10, 1918.....	39,000	4800	4 56
February 6, 1918.....	44,800	5800	5 51
March 8, 1918.....	51,000	6200	5 89
March 19, 1918.....	51,600	600	57
(Date of removal)	<u> </u>	<u> </u>	<u> </u>

For the purpose of meter reading the district served by the company is divided into squares which are then subdivided into meter reading routes. From 300 to 500 meters, according to the density of the population, are included in each of these routes. The meter reader assigned to cover a route is furnished with a sheet showing the name, address and number of the meter of each consumer on that route. There is nothing on that sheet to indicate the date of the previous reading of any meter or what that previous reading showed. Meter readers thus having no record of prior readings, have to actually read each meter on the route unless they merely guess and put down some arbitrary figure which, however, would soon be discovered. The company's usual practice is not to assign the same meter reader to cover the same route for successive months. The testimony was to the effect that a different man read complainant's meter on December 7, 1917, on January 10, 1918, and February 6, 1918. Allowing the mistakes in readings, the figures given above showing the gas registration may, I think, be regarded as substantially accu-

rate readings. This, of course, does not mean that complainant actually consumed the amount of gas indicated under the above heading, "Consumption cu. ft.," for due allowance must be made for the excessively fast registration.

The company's foreman of the gas and meter repair shop testified that the meter in question had been brought to the repair shop on March 19, 1918, and was taken apart and examined in the shop on March twenty-seventh, the day after the meter had been tested by the Commission's inspector. The foreman testified that a little of the paint on the center of the bottom of the meter was shriveled, that the diaphragm had broken away for eight or ten inches from the lower part of the meter and had contracted and shriveled up into the rim on both sides and that the solder joining the parts had been melted away. In his opinion an intense heat had been applied to the under part of the meter, causing the defective condition resulting in the fast registration.

Assuming that the fast registration was the result of a tampering with the meter, the company does not allege that the complainant caused, either directly or indirectly, such tampering. There is no proof before the Commission to indicate when or by whom the alleged defective condition of the meter was caused. The Commission's gas inspector testified that the contraction of the diaphragm causing fast registration might be brought about by heating or cold and by water in the diaphragm or measuring part of the meter. That some water was found in the meter is proven by the testimony of the company's employees who stated that they disconnected the meter, threw out the water and connected the meter up again. After these men had called there seems to have been no further difficulty with the gas supply.

Considering the severe cold weather of last winter, especially for much of the period between Christmas eve and the first or second week of February, and the lack of heat in the lower apartment and cellar of the house where complainant lives, it is quite reasonable to assume that the water in the meter was frozen at least part of that period and that there may have been absolutely no gas supply for part of the time but that a change in tempera-

ture had caused the ice to melt in the meter so that when the men examined the meter only water was found in it. It is well known that generally throughout the city the gas pressure during the past winter was considerably below the standard and that while at certain times during the day people had some gas, at other times there was no gas or the supply was so low as to be almost negligible.

Gas meters are accepted as recognized standards for measuring gas. The meter that was on complainant's premises shows that gas passed through it during the period in dispute. If complainant did not use that gas, it is possible that there was a leak in the gas pipe in the wall of complainant's premises or that an unlighted gas jet in some obscure place was turned on.

A comparison of the amount of gas consumed during the winter months of 1917 with that registered by the meter for the corresponding months of the present year, shows a considerable increase. No doubt this must be attributed, at least in part, to the fast meter registration of 23.46 per cent. In view of the fact that gas appears to have passed through the meter during the time when the complainant alleged that she was unable to obtain it, and inasmuch as the evidence would seem to indicate that the meter was properly and carefully read, I hold that adequate relief to the complainant will be granted if the rebate already allowed for the fast meter is permitted to stand as an adjustment of the matter, and accordingly direct that an order of discontinuance be entered and the complaint dismissed.

**In the Matter of the Hearing on the Motion of the Commission
as to the Quality and Pressure of Gas Manufactured, Dis-
tributed or Sold by, and Interruptions in the Service of, Gas
CORPORATIONS Within the First District**

Case No. 2276

(Public Service Commission, First District, July 31, 1918)

Investigation as to the gas situation in the city of New York in regard to the capacity of the plants of the gas companies for manufacture and distribution of gas.

Factors affecting the gas supply and service and details as to quality and pressure of the gas furnished.

Responsibility for care and maintenance of equipment on consumers' premises. The relative danger in the use of water gas and coal gas.

The inability of the gas companies to procure supplies of coal and oil considered, as causing the complaints of consumers.

Failure of the companies, with one exception, to provide gas with candle power of the statutory requirement.

Methods of the companies in distributing gas to customers and reasonable improvements considered in reference thereto—recommendations of the Commission.

Owing to the many complaints filed with the Commission as to the failure of the gas supply during last winter the Commission on its own motion held a number of hearings dealing with the interruptions and the deficiencies in the quality and quantity of the gas supply during that period for the purpose of ascertaining what could be done to prevent the recurrence of such conditions.

The investigation extended to the ascertainment and survey of the various factors entering into the gas service. These factors included the quality and pressure of gas furnished by gas companies within the first district; the plants and methods employed by them in manufacturing, delivering and supplying gas and the causes of the interruptions to the service recently occurring to the disadvantage of customers; the service regulations and practices of the said corporations relative to a continuous supply of gas and the restoration of service in case of interruption; reasonable improvements in the plants, methods, property, equipments, appliances, service, practices and regulations which will promote the public interests.

A question of law is presented in respect to where the legal responsibility was for the maintenance and condition of service pipes and fixtures within the premises of consumers. The duty of a gas company to furnish service implies a right and duty to make reasonable rules and regulations

to assure the sufficiency and safety of the equipment within the building for which the gas is to be supplied. Reasons for this holding given at length.

The impression that the use of water gas is more dangerous than the use of coal gas is erroneous. As a matter of fact while they are both dangerous if escaping unburned there are more cases of explosions in the case of coal gas than in that of water gas. The elements entering into the situation where accidents have occurred include the pressure, size and natural ventilation of the room, the time of exposure, the degree of health of the person injured and even the extent to which the injured person makes excessive use of alcohol.

During the height of the gas stringency the Standard Oil Company was warned by the Consolidated Gas Company of the small supply of oil and was requested to make proper arrangements to keep the plants of the company supplied with oil. The Consolidated Gas System despite the unmistakable signs of an impending stringency in the supply of fuel materials failed to take proper precautions to provide before December, 1917, an adequate supply of oil and coal to tide over a considerable part of the period of shortage, the reason of its failure being its reliance upon the ability of the Standard Oil Company to supply oil as needed. The failure of the gas system to prepare for the stringency of supply, with the result that their product fell below the statutory requirements as to candle power, justifies the complaints of consumers.

The failure of the various companies to comply with the candle power requirements of the statute during the last winter they seek to explain upon the ground of extreme cold and abnormal weather conditions, resulting in an increase of gas consumption and in interferences with delivery at water points of coal and oil. The testimony at the hearing, however, shows that the companies' failure to furnish the required candle power was due not so much to the extreme cold weather as to their lack of foresight or inability to provide an adequate reserve of coal and oil to tide them over the winter season. The only company the record of which is clear as regards the fulfillment of statutory requirements is the Queens Borough Gas and Electric Company.

The methods of the various companies in regard to the distribution of gas to their customers outlined, and thirteen reasonable recommendations are made by the Commission and herein set forth in detail for the adoption of preventive measures to minimize such interruptions in service as occurred during the past winter, and to enable the gas companies to fulfill their obligations in respect to the continuity, adequacy and quality of the service furnished. The gas engineer of the Commission will report to the Commission from time to time to what extent and by what means these recommendations have been effected and what other measures should be initiated. *Held*, that at this time no order should be made by the Commission but that co-operation of the companies, the public, the city and the Commission will probably prove more effective than would compulsive orders.

KRACKE, Commissioner.—Timely heed should be given to the conclusions which may properly be drawn from the experience of the gas companies and their consumers, within the city of New York, during the winter of 1917-1918. The purpose of the hearings held at length by the Commission, dealing with the interruptions and the deficiencies in the quality and quantity of supply of gas was to develop fully the facts as to the circumstances and causes thereof, and thus to enable the Commission and its experts, the expert staffs of the companies, and the public, to form well-founded conclusions as to what may best be done to prevent the recurrence of last winter's difficulties. This memorandum has been prepared by way of summary of the developed facts and outline of the needful recommendations.

The experience of last winter operated to test, under severe and unusual conditions, the capacity of the plants of the gas companies for manufacture and distribution, and the efficiency of their organizations, for furnishing continuous, adequate and efficient gas service. The weather during the past winter was unusually rigorous; the supplying of coal for domestic uses and the supplying of fuel and other articles for gas manufacturing needs were hampered by difficulties of transportation and delivery, and, while the demand on the part of consumers for gas grew to unprecedented volume, the fuel supply of the gas companies which was diminished to an extent of inadequacy for ordinary demands was, of course, totally inadequate for the extraordinary demands; the near-exhaustion of fuel compelled a decrease, in the case of some companies, of the output of gas and also of the candle power of the gas furnished; the frigidity reduced the quality and interrupted the flow of gas; the resources, facilities and capacity of the gas companies were heavily strained or overtaxed; misapprehension existed as to the causes of the extreme situation, and complaints by consumers were never before so numerous.

How far the gas companies, their plants and organizations, were prepared to render service under these circumstances, conforming to legal standards and what were the factors which affected the

service, were shown during an investigation into the gas supply which was undertaken by the Commission on its own motion and which was conducted through formal hearings and taking of testimony of company operating officials, consumers, and Commission staff members. A survey is here presented of the evidence submitted, together with the conclusions of the Commission thereon.

FORMAL PROCEEDING ON MOTION OF THE COMMISSION

This proceeding was instituted by the adoption by the Commission on February 13, 1918, of a resolution directing that a hearing be had for the purpose of inquiring and determining as to the following matters and things:

“(1) The quality and pressure of gas manufactured, distributed or sold by gas companies within the first district, the plants and methods employed by the said corporations in manufacturing, delivering and supplying gas within the first district, and the causes of interruptions which have occurred recently in the supply of gas to individual customers of said gas corporations;

“(2) The service, regulations and practices of said corporations in respect to the continuous supply of gas to customers and the restoration of gas service in cases of interruptions; and

“(3) Any reasonable improvements in the said plants, methods, property, equipment, appliances, service, practices and regulations of any of the said corporations as will promote the public interest, preserve the public health, protect those using such gas and those employed in the manufacture and distribution thereof, and render safe and adequate the service furnished and provided by each of said corporations.”

A considerable volume of testimony and numerous exhibits were submitted in evidence at hearings in which there participated numerous consumers, the corporation counsel of the city of New York and officers and representatives of the gas companies. The salient facts adduced are set out in the *survey* of the evidence under the following topics:

Climatic conditions prevalent during the winter of 1917-1918.

Complaints of consumers.

Gas poisoning.

Freezing of house services.

Responsibility for care and maintenance of equipment on consumers' premises.

Gas appliance business conducted by gas companies.

Composition of gas.

Plant, fuel, manufacturing and distributing conditions.

Compliance by companies with candle power statute.

Heating power of gas.

Compliance by companies with pressure orders.

CLIMATIC CONDITIONS PREVALENT DURING WINTER OF 1917-1918

The circumstances which intensified and brought to aggravated form the conditions affecting gas supply within the city of New York during the past winter were obviously the temperature and weather. The reports of the United States Weather Bureau for the months of December, 1917, and January and February, 1918, show unusually severe cold weather and, in periods, unprecedented coldness.

During December, 1917, on every day excepting four days, the mean temperature was below normal by one degree Fahrenheit to thirty-six degrees Fahrenheit. The mean temperature of twenty-five degrees Fahrenheit for that month was the lowest since 1871, and the snowfall for the month was eleven and seven-tenths inches, which was five and one-tenth inches above normal.

During January, 1918, excepting on five days, the mean temperature was below normal by one degree to twenty-eight degrees Fahrenheit. The mean temperature of twenty-one and six-tenths degrees Fahrenheit for the month also was the lowest since 1871, and the snowfall for that month was thirteen and six-tenths inches, or four and nine-tenths inches above normal.

During February, 1918, the mean temperature was only one and one-tenth degrees Fahrenheit, below normal; but between

February first and tenth the mean temperature for every day, except February seventh, was below the freezing point.

Particularly from December 22, 1917, to February 10, 1918, there was a spell of extreme and unprecedented cold weather in the city of New York. Heavy snowstorms occurred during this period. Transportation traffic in and about New York was seriously crippled; the East, the Hudson, and the Harlem rivers, the New York Bay and the creeks and waters adjoining them, through which boats and barges loaded with coal, oil and other supplies for both domestic and gas company uses must pass, were blocked with ice, and navigation was suspended for days at a time. Access to piers for unloading coal and oil for the use of the gas companies was prevented. Tug boats ordinarily employed to haul coal barges and oil tankers were seriously damaged by ice and put out of commission.

COMPLAINTS OF CONSUMERS

The delivery of coal and oil to the gas companies was hampered to such an extent that the quantity on hand in excess of the current needs of most of the plants was rapidly depleted. In some instances the supply became exhausted or approached the point of exhaustion. The interruption in the supply of coal persisted, and produced an acute situation of lack of fuel in many homes throughout the city, as a result of which those who were unable to secure sufficient heat by means of consuming coal in house furnaces resorted to an unprecedented use of gas. The demand upon the gas companies thereupon increased enormously. For example, on Saturday, December 10, 1917, the output of gas by the Consolidated Gas System jumped to 128,678,000 cubic feet, representing an increase of 22,000,000 cubic feet over the preceding Saturday and an increase of 32,480,000 cubic feet, or 33.7 per cent over the corresponding date in 1916. The output on this day was 10,000,000 cubic feet in excess of prior maximum in the company's experience. On December 30, 1917, the output reached 142,165,000 cubic feet, while on the same day in 1916 it had been only 96,264,000 cubic feet. On

December thirty-first the output was 145,026,000 cubic feet. Increases of similar percentages, beyond all expectations, took place in nearly every gas plant in the city.

The Consolidated Gas Company, which is the dominant constituent of the Consolidated Gas System and supplies gas in the greater part of the borough of Manhattan, was flooded with complaints by consumers. This company alone received 273,785 complaints during October to February, inclusive (1917-1918).

In January, 1918, the Consolidated Gas Company alone received reports of partial or total lack of supply due to frost from 46,641 consumers, while in January for the previous five years the average number was 1,242 with a minimum of none in 1913 and a maximum of 4,586 in 1914. The total number of such reports in five years 1913-1917, inclusive, was but 51,514, an average of 12,303 per annum, so that the number in January of this year was nearly equal to the entire number in the previous five years' history of the company.

The Consolidated Gas Company in the early part of 1916 conducted an intensive campaign of educating its customers to the possible dangers in the use of gas, by sending to all of its consumers pamphlets entitled "Don't Be Careless," in which attention was called to dangers to be apprehended from the use of gas and to the precautions which should be taken to provide against them, and the same information was disseminated in "Gas Logic," a circular published by the company.

The Bronx Gas and Electric Company which serves a portion of the borough of The Bronx and whose total number of consumers is small as compared with the larger gas companies in the city of New York, received in December, 1917, about 900 complaints, and in January, 1918, about 2,700 complaints, due to the freezing of service and house pipes and meters. In every case, the company asserted, it gave relief as quickly as the company's employees could get around, making no charge for the work done, and it disclaimed any negligence or responsibility on its part for the troubles.

The Brooklyn Union Gas Company, which directly or through

subsidiaries supplies gas in the greater part of the borough of Brooklyn and in a part of the borough of Queens, received 156,809 complaints from consumers from December 1, 1917, to February 28, 1918, as compared with 64,218 complaints during the corresponding period of the preceding year.

From December 1, 1917, to February 28, 1918, there were 158,809 visitations made to consumers by representatives of the company, as a result of complaints. The company's official testified that it was its practice, when complaint is made to it, to investigate as soon as possible and remedy the cause; that when complaint is made as to high bills, and is found just, rebates are made and, if deemed unjust, the consumer has the option of having the meter tested by the company or the Commission.

During the past winter the company sent out notices to its consumers cautioning them as to the dangers to be anticipated from the use of gas during the stress of the severe winter, this notice being printed on the bills sent to consumers. The notice called particular attention to the necessity of keeping gas fixtures and appliances and rubber tubing in perfect condition to prevent accidents.

The Kings County Lighting Company, which furnishes gas in the thirtieth ward of the borough of Brooklyn, received the following number of complaints from consumers: December, 1917, 2,154; January, 1918, 5,293; February, 1918, 1,204.

All of these complaints, with few exceptions, were attended to by the company, and at times employees were out remedying complaints twenty-four hours of the day. The great majority were attributed to frozen meters and frozen house risers and about 50 to frozen services, while only about 200 or 300 were attributed to poor gas. The number of complaints in this season of 1917-1918 was much greater than the corresponding season of the preceding year.

The Brooklyn Borough Gas Company, which operates in the thirty-first ward of the borough of Brooklyn, received 7,216 complaints from consumers between December 1, 1917, and February 28, 1918, whereas it received only 3,025 complaints

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during the corresponding period of the preceding year. The company's manager testified that so far as freezing was concerned, 50 per cent of the trouble was on the consumer's side of the meter, but that, nevertheless, the company attended to all complaints as fast as possible. This company operates under unusual topographical conditions. Many of its mains are exposed to the rise and fall of the tide. Most of the complaints, according to the company's version, were due to the character of the buildings in the Coney Island district, which are of frame construction with open spaces under the house and with house risers and meters so set as to expose them to frost.

In the borough of Richmond, comprising Staten Island, which is served exclusively by the New York and Richmond Gas Company, the company received 4,328 complaints between January 1, 1918, and February 15, 1918, of which 80 per cent related to troubles which were located on the consumers' premises and which were due to faulty house piping or faulty meters. The complaints of the corresponding period of the preceding year were almost negligible in number compared with the complaints of 1918. The company relieved all the frost troubles wherever located. For several prior years the company had been making efforts to compel changes in the house piping so as to prevent frost troubles and had sought by advertisement to give publicity to its admonitions. The house risers are generally located in exposed parts of frame houses, and this condition could, according to the company's general manager's view, be readily remedied by dropping a new riser within the partition three or four feet back of the front wall or by a slight rearrangement of the pipes at small cost. Moreover, the company claims that its investigation disclosed defective laying of pipes at improper angles, improper alignment or poor connections and traps, and this condition prevails particularly in suburban localities.

The Queens Borough Gas Company, which serves the fifth ward of the borough of Queens and an adjacent part of Nassau county, received on an average several hundred complaints a month, due mainly to frozen services. Its practice was to investigate the complaints and satisfy them whenever possible.

It is thus seen that there was an abnormal number of complaints by consumers, out of all proportion to the number in corresponding periods, and the available forces of the companies to handle and remedy the complaints were not only taxed to the utmost but proved to be inadequate. Company officials who testified before the Commission evinced a ready and willing disposition to satisfy complaints or remove their cause. But with so large a number of complaints arising at about the same time, the forces of the companies were overwhelmed, and the trying conditions naturally increased the irritation of a great many consumers, the adjustment of some of whose complaints was necessarily delayed while the available forces of the companies were making their round.

The underlying causes of these complaints, how they were remediable and what precautions should have been taken last winter or should be taken in the future, will be reviewed.

GAS POISONING

A distressing feature of the difficulties experienced last winter in the gas supply in the city was the number of cases of gas poisoning.

The reports of the health department of the city of New York (Exhibits Nos. 1 and 8) show that during the period from December 1, 1917, to February 23, 1918, inclusive, 264 persons died in the city from gas poisoning, as follows: Manhattan 137, The Bronx 15, Brooklyn 95, Queens 10 and Richmond 7. Gas poisoning is not a rare mishap. The report of the same department for the corresponding period of the previous winter shows 152 deaths from gas poisoning in the city, as follows: Manhattan 77, The Bronx 4, Brooklyn 56, Queens 13 and Richmond 2. But, during the past winter, there was a material increase in the number of deaths from gas poisoning in all the boroughs, excepting Queens, over the previous winter.

A report of the police department of the city of New York, covering non-fatal as well as death cases, shows that during the period from November 1, 1917, to February 15, 1918, inclusive, there were 621 cases in the city of New York, in which 746 per-

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sons were poisoned by gas, causing 331 fatalities. A tabulation of the reported cases, prepared by the chief gas engineer of the Commission, classifies the causes, but not as to the number of persons affected in each particular case, as follows:

Cause unknown	119
Suicidal intent	63
Probable suicidal intent.....	10
Accidental escape of gas from jets, automatic burners and appliances	207
Repairing and thawing house pipes and appliances.....	21
Broken house pipes.....	2
Hose accidentally slipped off.....	35
Flame blown out by wind.....	15
Gas went out.....	4
Thawing of frozen pipes.....	15
Appliances improperly lighted.....	3
Flame quenched by water from kettle.....	1
Leaky and defective valves, jets, cocks, house piping, fixtures and appliances.....	61
Leaky and defective tubing.....	26
Leaky and defective meters.....	4
Leaky main in street.....	1
Repairing meter or meter connection.....	2
Repairing service in street.....	2
Upsetting gas appliance.....	3
Intoxication	5
Hanging clothes on fixtures.....	1
Company turned off gas without inspecting jets.....	1
Gas from other sources than utilities supply.....	12
Carbon dioxide suffocation on account of poor ventilation.	1
Physical ailment causing improper manipulation.....	2
Combination of gas poison with other physical ailments..	3
Unable to turn off stiff gas cock.....	1
Burned when lighting gas heater.....	1
Total	621

The increase in the gas poisoning cases this past winter over the previous winter undoubtedly arose out of the combination of the extreme cold weather and the lack of coal for domestic uses, which created a tremendous demand for gas stoves and heating appliances of varying construction and efficiency, and a corresponding increase in the use of gas such as the companies in this city had never before been compelled to meet in a similar period of their history. A great number of service pipes leading from the street mains to the house meters as well as house pipes were frozen and interruptions in the service resulted. Direct and positive proof of the details of most of the occurrences are lacking. However, the circumstances which could be ascertained indicated with fair certainty the causes in the majority of individual cases. It is naturally conceivable that while the services and house pipes were in this frozen condition consumers would turn on the gas cock to light their fixtures or heating appliances and would carelessly fail to turn off the cock if no gas flowed, and when the pipes would thaw out the gas would flow through and escape unburned into the room. Then, again, after fixtures and appliances had been lighted the freezing in the service pipes and house pipes would result in the extinguishment of the flame, and the subsequent thawing out of the pipe would allow the escape of the unburned gas into the rooms. Owing to enforced suspension of heating in parts of buildings where pipes were exposed, freezing set in. While the extreme cold weather continued and during the coal scarcity many cheap and dangerous gas contrivances were put upon the market. Many of the consumers who purchased stoves and appliances, but who were inexperienced or uninformed in their use, were probably unable to adjust and use them properly. The claim was made that some of the types of tubing which were placed on the market and used were defective and improper for the purpose intended, some being made of paper and others of cheap rubber which would crack when given a slight twist, others being of such flimsy material that they could be burned or broken without the slightest trouble. It is safe to say that

the twenty-six cases of leaky and defective tubing were due to this cause. The thirty-five cases resulting from hose accidentally slipping off the jet, and some of the sixty-one cases of leaky and defective valves, jets, cocks, house piping, fixtures and appliances could undoubtedly have been avoided if modern, up-to-date tubing and connections with safety connection or cock had been used. While, as appears from the testimony, the gas companies selling and leasing heating and cooking appliances install solid pipe connections wherever practicable and sell only the latest and best types of tubing and connections therefor, not all other dealers in gas fixtures or appliances are similarly concerned. No evidence was introduced to show that any of the cases resulted from defects in any of the gas ranges or appliances sold or rented by the gas companies.

One of the most frequent causes of accident lies in the use of the open flame gas lighting burner known as the flat flame burner. The principal factor is the absence of stops on burner cocks or the wearing down of stops or ride of stops above the collar, thus permitting the key to turn clear around. The only certain preventive of such accidents is a discontinuance of the use of flat flame burners for illumination and the substitution of mantle lights. Mantle lights not only give a light approximately five times as bright as the open flame burner but use 50 per cent less gas in doing so. Accidents from the use of mantle lights are rare, for the reasons that (1) where the gas cock is accidentally turned on in extinguishing the light the heat remaining in the mantle will generally reignite the gas; (2) it is extremely difficult to blow out such a light; (3) where an accidental escape of gas occurs a very much smaller quantity can escape than with a flat flame burner, (4) and there are a fewer outlets required for such lights and the chance of accident is accordingly reduced. The general effect of the use of mantle lights in place of flat flame burners will be a reduction in the consumption of gas used for illuminating purposes. There are probably over 1,000,000 open flame burners in use, through which approximately 20 per cent of the total consumption of gas is used, and the substitution of the mantle

lights would provide a very effective safeguard against dangers now encountered in the use of open flame burners.

No evidence was introduced establishing direct relation between the many cases of gas poisoning and the failure of the companies to observe and obey the laws of the State of New York fixing the illuminating power of gas and the orders of the Commission prescribing gas pressure regulations. The candle power is very important where open flame burners are used for illumination but unimportant in mantle lamps; neither has it any importance where cooking and heating appliances are concerned. The essential factor in the use of mantle lamps and heating appliances is the thermal quality. The pressure in the gas keeps it moving and it has been shown that so far as open flame burners are concerned a pressure as low as one-tenth of an inch would maintain the flame and in no case has the pressure in the mains been shown to be as low as that during the past winter. Where the candle power is reduced it reduces the illumination in open flame burners but does not result in interruptions of the supply. A sudden drop in pressure, however, will affect mantle lamps and cooking and heating appliances which are adjusted to a fixed pressure as was stated above. In cooking and heating appliances where such a drop occurs there is a danger of a flash back and burning of flame in the orifice feeding the appliance resulting in the production of carbon monoxide in the room. The police department reports of gas poisoning cases as tabulated by chief gas engineer of the Commission fail to indicate that any of the cases resulted from deficiency in quality or in pressure in the mains.

The Consolidated Gas System several years ago introduced the use of the pulmotor in New York city. This appliance is designed to restore to consciousness people overcome by gas, as well as for use in other cases of unconsciousness. I understand other companies own and use pulmotors, but it does not appear that all of them do. All of the system's emergency wagons carry this instrument at all times and their men are trained to use it efficiently and it is invariably operated under the direction of a physician when one is present. During January, 1918, the pul-

motor crew of this system was called upon to answer twenty-six cases of gas poisoning affecting twenty-eight persons and in all but three of the cases the patients were revived. There were four fatalities. According to the claim of the company, twelve of the cases would have been prevented if a mantle burner had been used. The importance of an appliance such as this can readily be conceived and I suggest that all gas companies in the city of New York be requested, if they have not already done so, to install a pulmotor on their emergency wagons.

Experience has shown that whenever there is a great increase in the use of gas a temporary increase in gas accidents follows. While any fatality due to accident is lamentable and no effort should be spared to conserve health and life, yet when the weather conditions of the past winter, and the attendant lack of coal and the tremendous increase in gas consumption, are considered, it is remarkable that in a city of over 6,000,000 inhabitants there was not a greater percentage of gas poisoning cases, many of which are, no doubt, attributable to suicidal intent. I am of the opinion that many of the cases of gas poisoning were due to ignorance on the part of consumers who were not familiar with the dangers to be guarded against in the use of gas ranges and some of the appliances put in service, often improvisedly and impromptu, for heating purposes.

It has been tritely remarked by the Court of Appeals that "The properties of the illuminating gas in ordinary use, its inflammable and explosive character, are well understood, and every person of mature years and ordinary intelligence, cannot be presumed to be ignorant of them." *Lanigan v. N. Y. Gas Light Co.*, 71 N. Y. 29, 33.

It would, however, be imprudent and unjust for gas companies passively to rely solely upon the intelligence of consumers to take all proper precautions to avoid accident and disaster in the use of gas and not to exert themselves in an active effort to protect the ignorant and the heedless in the use of gas.

In the early part of 1916 the Consolidated Gas Company sent to all of its consumers pamphlets entitled "Don't Be Careless,"

calling attention to dangers to be apprehended from the use of gas and precautions to provide against them, and the same warning was printed in "Gas Logic," a circular published by the same company. In the emergency, in December, 1917, and January, 1918, a postal card was mailed to each person who complained to the company, assuring him of the company's efforts to remedy the complaints and cautioning that, in the event of a failure of supply, all burners be kept turned off until the supply has been restored.

Other companies, but not all, make it a practice to send out warnings to their customers. For example, the New York and Richmond Gas Company usually at the beginning of the fall season advertises in the local papers and on the back of gas bills its willingness to inspect gas appliances and tubing and calls the attention of the consumers to the dangers from defective gas tubing.

It is quite apparent that a large mass of gas users in the city have not a full realization of the lurking dangers in the use of gas, especially in times of greatest need for the service and demand upon the resources of the gas companies. Gas companies have a responsibility in the safety of the supply and use of gas by their consumers and they must share in great part the interest of the community in surrounding the supply and use of gas with every possible protection against danger. They stand in an advantageous relation to the consumers to educate those who are not fully acquainted with the possible dangers how best to avoid them. They should make it a practice periodically, and especially at such times when causes exist to create dangers, to inform and warn their patrons of the dangers and to advise the precautions which should be taken to avert them. Such notices could be most effectively circulated by printing them upon the back of bills.

FREEZING OF HOUSE SERVICES

The majority of complaints received both by the companies and the Commission were due to interruptions in supply. The principal cause, apparently, of the many interruptions in supply

of gas during the past winter was the freezing of service and house pipes due to the extreme cold weather and lack of coal. The law seems to require or permit an open areaway in front of a tenement house which makes necessary the exposure of a portion of the service pipe leading from the main to the meter on the premises. The service pipe extends from the mains in the streets to the meters in the buildings.

Every gas has a certain vapor tension, whether it is the atmosphere outside, illuminating gas of any kind, or carburetted water gas or coal gas, and it will take up moisture mechanically in an amount depending upon the pressure and upon the temperature. It leaves the gas holder saturated with a certain amount of this vapor. When it comes in contact with a cooler spot that moisture is naturally thrown down the same as it would be in the condensers in the gas works, and, if it is cold enough at that spot, the water freezes. Further supplies of gas coming along supply further quantities of that aqueous vapor, and that freezes, and if the cold snap is long enough there is danger of the entire pipe being frozen.

It is important in order to prevent the freezing of the service pipes, which is a common occurrence in winter, to protect the service pipes in some manner against the cold and frost. The frozen services are due to a large extent to inadequate protective covering for the pipe where it passes through the areaway, but during the past winter even where the pipes were protected by a covering it seems that the cold spell continued for such a length of time that freezing resulted anyhow. All service pipes where they pass through areaways should have a protective covering of an approved type. Ordinarily, when underground, the service pipes are protected but the danger point usually is in the portion of the pipe passing through areaways. Again, another condition that permits of the freezing of the pipes, not only service pipes but house pipes and risers as well, is the condition of the cellar and the position of the house risers. If the windows in the cellar are open and the pipe is close to them the pipe will freeze. Where the house riser goes up on the side of the building and there is

no heat in the building the outside temperature affects the risers and pipes and freezes them. During the past winter as a result of the scarcity of coal the cellars in numerous buildings were without heat and many of the homes were either without heat or inadequately heated resulting in the abnormal number of complaints of frozen pipes which to some extent was responsible for the many gas poisoning cases. In some sections of the city, particularly The Bronx and Richmond and outlying sections in Brooklyn and Queens, there are many frame as well as detached houses wherein there is a greater tendency of house pipes and risers to freeze than where the house is in a solid block or of stone and brick. Where a house is exposed on all sides to the weather it is more susceptible to freezing than if it were in a solid block. The companies have no control over the house pipes and risers, as they are the property of the landlords or tenants and are located on the consumers' premises. When pipes are affected by frost, it may cause an interruption in the supply or reduce the pressure. Many meters were affected by the frost during the past winter. A rule (No. 181) of the building department established under and in accordance with section 600 of the Building Code requires the construction, whenever practicable, of the house risers within five feet of the front wall of a building and the location of a meter is accordingly not over five feet from the building wall.

The Consolidated Gas System has made experiments with the construction and arrangement of service pipes so as to prevent freezing. The service pipe is ordinarily two inches in diameter. The experiments demonstrated the necessity of adequate protection for the portion of the service pipe in areaways exposed to the weather. Where a service pipe supplying a single building was frozen it may and oftentimes does result in complaints from all or the major portion of all of the tenants of that particular building. The law requires or permits an open areaway adjacent to tenement houses; and special precautions are necessary to prevent frozen service pipes. The best methods employed are wood lagging, enlargement of service pipe where passing through the areaway, or a dead air space about the service formed by a collar of

larger diameter than the service, for a length extending to the street side of the retaining wall of the area. Special protection is also essential to the service valves. The latest development in protection of service pipe appears to be a covering with a sleeve, and a joint made on either side, and a dead air space, which protects the pipe against any frost whatever even at zero temperature except where the cold spell continues for a long period of time. The valve is covered with an asbestos plaster, and above the valve comes the valve box, and the covering above. This type of protective covering has been used only about two years. Other types of protective covering have been in use as far back as eight or ten years. The Consolidated System, however, has not placed this covering on all services but only where a service protection requires replacing or where a new work is installed. All buildings are piped in accordance with the requirements of the bureau of buildings and gas companies cannot set a meter until the proper certificate is filed with it.

RESPONSIBILITY FOR CARE AND MAINTENANCE OF EQUIPMENT ON CONSUMERS' PREMISES

It is important to note that the tabulation of poisoning cases given above shows that there were sixty-one cases due to leaky and defective valves, jets, cocks, house piping, fixtures and appliances, twenty-one cases to the repairing and thawing of house pipes and appliances, two cases to broken house pipes, fifteen to thawing of frozen pipes (it not appearing whether these were house pipes or service pipes) and two hundred and seven cases to accidental escape of gas from jets, automatic burners and appliances, all of which were located in homes and buildings.

In connection with the maintenance and condition of service pipes and fixtures within the premises of consumers, there is presented a question as to where the legal responsibility therefor rests. The duty of a gas company to furnish service implies a right and duty to make reasonable rules and regulations to assure the sufficiency and safety of the equipment within the building to which gas is to be supplied. *Tismer v. New York Edison Company*, 170

App. Div. 647; *Schmeer v. Gas Light Company*, 147 N. Y. 529. A gas company might incur heavy responsibility if it failed to take steps to assure itself of the sufficiency and safety of the interior equipment to which it was *about* to deliver gas. *Id.* But what is a gas company's responsibility after it has turned on the service and after it has become satisfied that initially the equipment is sufficient and safe? In the case of *Schmeer v. Gas Light Company*, there was involved the question of the liability of a gas company for negligence in failing to make any inspection of the gas piping in a house before turning on the gas supply, as a result of which injury occurred to a customer. The court held that it was the gas company's duty to take such precautions. But it was argued that, if such responsibility were held to exist, the maintenance of the piping would become a continuing liability of the gas company. The court declared, however, that there was no basis for such liability, saying (147 N. Y. 529, 540, 541):

"The defendant also urges that it was not its duty to turn on the gas, but it was only obliged to allow it to be turned on, and, therefore, it ought not to be held liable for the act of a stranger. In this we think it entirely misapprehends its duty. It is obliged to supply the gas to applicants. When they have done what is necessary to make a connection with its consent with the mains of the defendant and have applied for and obtained the meter to measure their supply, we are clearly of the opinion that in order to fulfill its duty to supply gas the defendant is under the obligation when applied to of turning it on so that the supply may be given. Certainly it ought not to be held liable for the act of a stranger in turning on the gas without its knowledge or request. We do not permit any liability to be founded upon that fact. If liable at all, it must be for its own neglect (if the jury shall so find) in failing to make any inspection and in adopting a custom which when carried out permitted the turning on of the gas by any one at any time after the delivery of a meter by the company. This is the extent of defendant's liability. We do not think the principle of the case of *Rylands v. Fletcher* (L. R. [3 Eng. & Ir. App.] 330) applies here. The defendant

is not an insurer. In the English case the defendant was held liable at all events for the damage done to his neighbors' mines by reason of an overflow from water which the defendant had accumulated on his own land.

"Here the defendant is engaged in manufacturing and selling an article which has become so universally used for illuminating purposes as to be regarded almost as an essential of city life. Having manufactured it, the law compels the company to furnish it to an owner or occupant on certain terms. It is bound not only in the fulfillment of the purpose of its existence but by affirmative provisions of law to deliver the gas into the buildings of others. In making that delivery it is not an insurer, but is simply bound (in such a case as this) to that degree of care which the nature of the article it deals in and the consequences to be apprehended from an accident reasonably call for. Nor do we assume to say that when once the piping in cases similar to this has been fairly and properly examined previous to turning on the gas (if such examination by defendant's servants is called for at all), that thereafter there is a continuing liability on the part of the company to see to it that such piping is kept in proper condition. As the company has no control over the piping, does not put it in and is not consulted about it, the principle upon which it might be held liable in cases of this character at the time of the first delivery of gas, if no precaution were taken at all, is simply that it would have the right to refuse to turn on, or permit others to turn on, the gas for the supply of the applicants until properly assured of the condition of the piping in other portions of the building. Having become assured of it, and the gas being on, it would not seem that the company ought further to be regarded as liable for the continuous good condition of the piping. Here we may justly say that to impose such a liability upon the defendant would clearly be unreasonable. It would render necessary the examination at frequent intervals of all the buildings in the city in which gas was used. This would be so onerous as to be practically impossible of execution because of the expense to the company. The law ought not to, and does not, exact an unreason-

able amount of care from any one. Under the restrictions, however, as above stated, we think the question of defendant's negligence was for the jury."

Upon the authority of this decision, the Appellate Division of the Supreme Court in the first judicial department has recently held, in the case of *Pernick v. Central Union Gas Co.*, 183 App. Div. 543, that there was no duty of continuous inspection by a gas company of a gas range sold by it to a consumer.

The gas corporations are not required by any express provision of statute or order of the Commission to install or inspect piping, fixtures or appliances in homes or other buildings. In practice, the piping, fixtures and appliances used are installed, owned and controlled (excepting, of course, ranges rented by the Consolidated System) either by the landlords or leasees of the homes or buildings. The common practice of the companies has been, however, upon complaint by consumers, to send their inspectors without charge to look over the pipes, fixtures and appliances and determine and remedy the trouble, if possible.

The official power and duty of the oversight of the safety of dwellings so far as gas pipes and apparatus in homes and buildings are concerned appear to be vested in the city authorities. The Building Code provides (§ 600) that gas piping and other systems of pipes or apparatus for holding or conveying gases installed and maintained in or upon any building in the city shall conform to such rules as may be provided for by law or found necessary for the protection of life, health or property, and adopted by the superintendent of buildings, and forbids the use of any system, piping or apparatus installed or maintained in violation thereof or of the rules adopted thereunder; and also provides (§ 603) for the inspection and testing, under the supervision of the bureau of buildings and in accordance with its rules, of any new system or any extension of an old system of gas piping in any building in order to insure the tightness of the system. The Sanitary Code of the board of health provides (§ 277) that all gas pipes in any building or premises shall at all times be kept in good order and repair so that no gases or odors shall escape therefrom and so that the same shall not leak.

GAS APPLIANCE BUSINESS CONDUCTED BY GAS COMPANIES

The larger number of the gas appliances used by consumers, particularly gas ranges, are sold or rented and are installed by the gas companies. The extent of this line of business can best be appreciated by stating that the Consolidated Gas System now has on rental 432,158 cooking appliances. The business is conducted merely to promote the use of gas and thereby to increase the company's profits from the sale of gas. The fact that the gas companies incidentally do engage in this commerce, even if only incidentally, has been claimed to be good reason for the regulation by the Commission of the acts, regulations, rates and charges of the companies in this business. The Commission has, however, been forced to the conclusion that the Legislature has conferred no power upon the Commission to regulate the sale and rental of gas ranges, except that, as that forms a part of the business transacted by the company, the Commission has authority to inquire into the relation and effect of that enterprise to and upon the transactions of the company which the Legislature has subjected to the supervision and regulation of this Commission. In order to ascertain to what extent the condition of gas appliances contributed to interruptions in service, it became necessary to inquire into certain features of the supply and maintenance of gas appliances.

All of the gas companies supplying gas in the city of New York sell gas ranges and other appliances, but the Consolidated System alone rents ranges for cooking purposes only. One or two of the companies rent arc lamps, but apparently not to any great extent, and there has been no complaint from consumers or others in relation thereto. No auxiliary attachments are rented. All types of ranges sold by the companies may be purchased elsewhere in the city of New York from dealers, department stores and the like.

The only type of range now rented by the Consolidated System is the Peerless range, of which there is a series of four: Peerless Elevated, rental eight dollars per year (formerly six dollars per year); Peerless Cabinet, seven dollars per year (formerly six dollars per year); Peerless, Junior, three dollars per year (formerly two dollars and fifty cents per year), and Peerless Double

Oven, five dollars per year (formerly four dollars per year). The Peerless range has been designed by the Consolidated System, is of cast iron, and is manufactured especially for the system. Many of the ranges of the company now under rental, however, are of other types which were leased some time ago. All the Peerless ranges which are not rigidly connected have what is known as safety cocks, having a double screw and a spring which prevents accidental disconnection of the tubing. The double nut forms a jamb not holding the cock tight, and the spring maintains the cock in position. The safety cocks used in the Peerless ranges are also placed on the other types of ranges under rental when taken in for repairs. All ranges of the company in the borough of The Bronx are equipped with safety cocks. While all Peerless ranges as well as all other ranges sold by the company are equipped with this safety device, it is not placed on all appliances under rental.

A flexible tubing has also been developed by the Consolidated Gas Company for use on radiators and gas ovens consisting in cross section of a metallic tube packed in rubber; this tube is wrapped with wrapping paper to prevent moisture from getting into the next covering, over which there is a layer of cotton braid and then a composition gas-proof tube. On top of that there is another layer of wrapping paper which prevents access to it of moisture from the atmosphere, and an outer coating consisting of mohair braiding. The rubber ends are made in accordance with United States Government specifications for high grade rubber gaskets and such ends have been tested to a very high pressure over a period of twelve months and show no set from their original shape. At the end of the hose connection used for gas irons there is a safety cock preventing accidental disconnection. Such tubing in use three years has shown no deterioration and discloses no odor of gas when in use.

The Consolidated Gas Company maintains a specially equipped laboratory for appliances, and it places no appliances on sale without first having made actual working tests to assure their safety and efficiency.

But no periodic inspections are made by any of the gas com-

panies selling or renting appliances. The companies make inspections only upon complaint, but without charge to the consumers. The inspections are made irrespective of the place of purchase. The employees of the company also make inspections occasionally when unlocking meters or connecting, exchanging or resetting appliances or when making demonstrations in the course of their regular duties. The companies claim that there is no necessity for periodic inspections, as their appliances give general satisfaction and their practice is that, when anything goes wrong and the matter is called to their attention, they inspect and remedy the trouble without cost to the consumer. They claim that the average cost of an inspection of an appliance is approximately twenty-five cents and that, if the companies be required to make periodic inspections, the cost will be prohibitive and will result either in an increase in the cost or rental of appliances or in the price of gas. For example, the number of inspections of gas appliances made by the Consolidated Gas System in the regular course of business in the year 1917 numbered 861,390. The company had 432,158 appliances on lease in the early part of 1918, and one inspection per year of each appliance would have cost the company, according to its calculation, \$108,042, with a corresponding increase for each additional inspection per year. As to the suggestion that meter readers could also inspect appliances when they called to read meters, it was pointed out that at least 50 per cent of the gas meters are located in the cellars of buildings and, if the meter inspectors were required to inspect appliances on their visits to read the meter, it would consume much extra time and require an increase in the staff. There appears to be no doubt that inspections of ranges and connections at stated intervals would materially aid in reducing the possibility of breaks and leaks in the appliances and lessen, to that extent, the danger of gas poisoning.

All ranges now rented by the Consolidated System have a safety cock which prevents the escape of gas, but, as stated above, some of the ranges rented years ago are without this device and the company as a matter of responsibility to its consumers should equip

all of its ranges now under rental with this device unless they are rigidly connected. All companies selling ranges and appliances should install safety cocks on the appliances before they go out to consumers, if they are to be connected with tubing. The tubing and connections necessary in the use of gas ranges and appliances should also be of the most modern and approved types from the standpoint of safety. Since it is the right and duty of gas companies to make reasonable regulations to assure the sufficiency and safety of the equipment within the buildings to which gas is supplied by them (*Tismer v. N. Y. Edison Co.*, 170 App. Div. 647, 650; *Schmeer v. Gas Light Co.*, 147 N. Y. 529, 536; *Elevator Mfrs. Assn. v. N. Y. & Q. E. L. & P. Co.*, 8 P. S. C. R. [1st Dist. N. Y.] 3); and in view of the facts disclosed at the hearings in this inquiry, regulations should be formulated and established by the gas companies to exact reasonable assurances of the safety of appliances and equipment upon consumers' premises.

The annual rental charges of the Consolidated System, as well as the price of all ranges generally throughout the city, were increased during the past winter, because of the increase in the cost of labor and material. Complaint was made concerning the increase in the price of ranges sold by the companies, and, particularly, concerning the increase in annual rental charges made by the Consolidated System as well as its charges for substituting new for old ranges. The Consolidated Gas System claims that the percentage of increase in the rental charges of the different kinds of Peerless range has not been nearly as great as the percentage of increase in the cost of manufacture. There seems, nevertheless, to be justification for the complaint of some of the consumers relative to the increase in annual rental charges, for the reason that, while the cost of the manufacture of ranges has increased only in the past year or two, the company has increased the annual rental charges on ranges manufactured and installed on the consumers' premises prior to the outbreak of the war.

The officials of the Consolidated System allege that the rental business of the company has been a source of loss and that the

annual rentals have been increased on all the types of ranges under rental not only because of the increase in cost of manufacture but as well to enable the company to break even on the enterprise. No complaint was made by consumers as to the cost of ranges sold by the other gas companies in the city of New York and the principal line of attack on the Consolidated System was directed to its practices concerning rental of ranges. The Commission is of the opinion, however, that it lacks statutory authority to deal with the problem of the charges in the sale or rental of gas ranges. The absence of such a power can afford an opportunity for practices and discriminations in service and rates which would violate the law, and that has been not an infrequent, though unsubstantiated, charge made by the complaining consumers.

While the companies are not required by law to rent or sell gas ranges to their consumers, and the consumers are at liberty to rent or purchase their ranges either from the gas companies or elsewhere in the open market, and the Commission does not find any authority in the statute for the assumption of jurisdiction over this business of the gas companies, yet the frequency of differences, and resulting friction, between the companies and the consumers concerning the practices or charges in the sale or rental of appliances, and the habit which the companies have fostered among consumers as a result of solicitation and inducements, of relying upon the gas companies for the supply of ranges and similar appliances are strong reasons why jurisdiction over this line of the business of gas companies should be conferred upon the Commission.

It would be consonant with the purpose of the Public Service Commissions Law of subjecting the relations between public utilities and their patrons to commission regulation, if power were conferred upon the Commission also to regulate the appliance business, where a company voluntarily undertakes to engage in it.

COMPOSITION OF GAS

The evidence convinces me that there is no foundation in fact for the insinuation which was given publicity that the accidents of asphyxiation were due to a change in the composition of the gas

manufactured and supplied to consumers. The testimony shows that there was no material increase in the poisonous elements in the illuminating gas which was analyzed. Several tests were made by the Commission in July and December, 1917, and in January and February, 1918. There was no regularity in the tests. Tests made in February of this year showed a slightly higher carbon monoxide in the gas supply by the Consolidated System, the percentage, however, being such as could be expected in variable tests. Officers of the various gas companies were interrogated with particular reference to this, and all testified that there was no substantial change in the chemical composition of gas during the last winter from previous winters. Carbon monoxide is the only constituent of illuminating gas which in the amounts ordinarily found is poisonous. Other constituents would produce suffocation, but not poisoning. There is no doubt, however, that the danger to life is greater with the use of gas of high carbon monoxide content than with the use of gas containing a lower percentage. Ordinarily coal gas contains from 5 to 10 per cent of carbon monoxide and water gas from 25 to 30 per cent. There appears to be, however, very little difference in the effect of either of these gases upon individuals, since poisoning would result to any individual subjected to the influence of any gas for any considerable length of time. The several analyses made in Manhattan and The Bronx show a slightly higher percentage of carbon monoxide in gas tested in February, 1918, than in gas tested in the months of July and December, 1917, and January, 1918, and yet the number of deaths from gas poisoning in the boroughs of Manhattan and The Bronx for February, 1918, was only twenty-five as compared with seventy-five in January, 1918, and twenty-four in February, 1917, while the number of deaths in the entire city for the month of February, 1918, was only fifty-five as against one hundred and forty-one in January, 1918, and as against fifty-six for February, 1917. A circular of the United States bureau of standards, placed in evidence, points out the following facts to indicate that the use of water gas may possibly not be much more dangerous than coal

gas: "A large proportion of the cases of death or illness caused by gas poisoning are suicidal, due to irresponsible condition, such as drunkenness, or to gross ignorance; and in the majority of these cases the character of the gas would perhaps have only a small influence upon the seriousness of the result. A smaller number of deaths and cases of gas poisoning are due, not to the illuminating gas itself, but to the carbon monoxide formed by combustion of the gas with insufficient supply of air, due to a faulty appliance or to an appliance improperly set or connected with insufficient or improper flues. These matters all have an important bearing upon the subject, and it is possible that the protection of the public from danger will be found to lie rather along lines of regulation of appliance form and setting and general education of gas users as to proper precautions than in the limitation of the carbon monoxide content of gas itself."

There is an erroneous impression that the use of water gas is much more dangerous than coal gas. Both gases are dangerous to human life if escaping unburned, while more cases of explosion would be expected in the case of coal gas than water gas. The size of the orifice, the pressure, the size and natural ventilation of the room, the length of time of exposure, and the health of the person at the time, and particularly the freedom from an excessive use of alcohol are all elements entering into the situation where chance causes an accident. Approximately 75 per cent of all gas made in the United States is water gas and its manufacture is absolutely necessary to handle the demand for gas under modern conditions. The Consolidated Gas System is the only one in the city of New York that manufactures coal gas, but the coal gas manufacture is only $7\frac{1}{2}$ per cent of the total gas manufactured by it. Water gas manufacture may be discontinued at a moment's notice and recommenced within a few hours but this is not true of coal gas manufacture. The coal gas bench requires from three to six weeks to bring it to working conditions and requires numerous men to operate, while a water gas machine may be started from a cold condition and operated by one man in a few hours.

PLANT, FUEL, MANUFACTURING AND DISTRIBUTING CONDITIONS

The output of gas in the city of New York during the winter of 1917-1918 increased to an unusual and unanticipated extent, as appears by the following table compiled from reports furnished to the Commission by the gas companies:

SEND-OUT OF GAS

COMPANY	Cubic feet		
	December, 1916	December, 1917	Increase Per cent
Brooklyn Union Gas System.....	1,632,880,000	2,073,632,000	27
Consolidated Gas System.....	3,040,734,000	3,603,299,000	18.5
Brooklyn Borough Gas Company.....	38,639,000	55,843,000	44.0
New York and Richmond Gas Company.....	45,044,000	54,470,000	21.0
Bronx Gas and Electric Company.....	21,788,000	24,071,000	10.5
Queens Borough Gas and Electric Company.....	22,969,000	25,852,000	12.1
Kings County Lighting Company.....	110,170,000	142,328,000	29.2
Grand total.....	4,912,224,000	5,979,495,000	21.7

COMPANY	Cubic feet		
	January, 1917	January, 1918	Increase Per cent
Brooklyn Union Gas System.....	1,629,510,000	1,877,082,000	15.19
Consolidated Gas System.....	3,118,411,000	3,922,338,000	25.86
Brooklyn Borough Gas Company.....	37,841,000	60,860,000	60.83
New York and Richmond Gas Company.....	434,783,000	586,098,000	34.82
Bronx Gas and Electric Company.....	21,243,000	25,633,000	20.66
Queens Borough Gas and Electric Company.....	22,160,900	26,872,700	21.21
Kings County Lighting Company.....	107,074,000	151,432,000	41.42
Grand total.....	5,369,022,900	6,650,315,700	23.86

COMPANY	Cubic feet		
	February, 1917	February, 1918	Increase Per cent
Brooklyn Union Gas System.....	1,468,229,000	1,760,293,000	19.89
Consolidated Gas System.....	2,847,240,000	3,275,001,000	15.02
Brooklyn Borough Gas Company.....	35,875,000	48,870,000	36.22
New York and Richmond Gas Company.....	38,596,000	48,732,700	26.26
Bronx Gas and Electric Company.....	18,618,000	21,301,000	14.41
Queens Borough Gas and Electric Company.....	20,126,000	21,795,300	8.29
Kings County Lighting Company.....	95,023,000	130,020,000	36.83
Grand total.....	4,523,707,000	5,306,016,000	17.55

The demand for service which was made upon the gas companies surpassed all their anticipations. With few exceptions, however, the companies claimed that their plant, facilities and distributing systems were adequate to meet even the unexpected and abnormal service demands, and that in the matter of fuel and supplies needful in the manufacture of gas their deficiency and consequent embarrassment was due to no lack of foresight on their part in entering into arrangements or exhausting efforts to secure sufficient quantities but only to the paucity in the market supply or to the impediments to delivery. The plants of the various gas companies operating in the city of New York are located on the water fronts and depend upon water transportation. During the unusual frigidness, and at a time when the supply of fuel had reached or was nearing the point of exhaustion, access to the piers or landing places was blocked by ice and storm, and some plants were for a time cut off from navigation. The difficulties experienced by each company were narrated at the hearings in more or less detail.

THE CONSOLIDATED GAS SYSTEM

This system comprises the Consolidated Gas Company and other companies operating in the borough of Manhattan and parts of the boroughs of The Bronx and Queens, and serves the largest number of consumers in the city. The system has eleven plants in the city, the largest plant in Manhattan being located at East Twenty-first street and the smallest at East Ninety-ninth street. The structural plant of the Consolidated Gas System was apparently of sufficient capacity to meet the great demands upon it. On January 1, 1918, the system manufactured as high as 145,477,000 cubic feet of gas, and its full capacity had not then been reached. On February 5, 1918, the output was 150,537,000 cubic feet, which represented the highest demand ever made upon the system in one day. The send-out of the system from December 1, 1917, to February 28, 1918, was 10,800,641,000 cubic feet of gas as compared with 9,004,385,000 cubic feet sent out during the corresponding period in the previous winter, or, in other

words, an increase of 20 per cent. The system experienced considerable difficulty and it was only by the exercise of extraordinary efforts that it was able to accommodate the demand upon it.

The Consolidated Gas Company officials, in view of unsettled conditions, had as early as February, 1917, given consideration to the question of coal supply for the winter business of 1917-1918. It was decided to discontinue the further sale of coke, which is the principal residual of coal gas manufacture, and to utilize it in the place of anthracite coal for water gas generation, and to store all surplus anthracite coal for winter use no matter how obtained. This course involved quite a loss to the company, as it rendered idle nearly one hundred horses and many delivery wagons used in the coke trade. The company officials, however, did not conceive the serious experience through which the gas industry would pass during the winter of 1917-1918, and it was not until about December 10, 1917, that the extraordinary possibilities that would have to be met were indicated. On that day temperature fell to sixteen degrees Fahrenheit, and the output of gas jumped to 128,678,000 cubic feet—an increase of 22,000,000 cubic feet over the preceding Saturday, when the temperature was thirty-one degrees Fahrenheit, and an increase of 32,480,000 cubic feet, or 33.7 per cent over the corresponding day in 1916. The Astoria coal gas plant was running at about half its capacity at that time, owing to the shortage of gas coal, and the unavailability of sufficient labor forces was causing anxiety. This plant was immediately fired up to 7,000,000 cubic feet capacity, the full coal gas capacity not being available except as a last extremity because of the important work then under way at the plant for the United States Government. The output of December tenth was 10,000,000 cubic feet in excess of the prior maximum in the experience of the company. After December tenth and up to December twenty-eighth the increased demand as compared with the previous year was not extraordinary. On December seventeenth the Mutual plant was compelled to shut down entirely because its reserve stock of oil was entirely exhausted, but was started up again a few hours later upon the

arrival of a barge. On December twenty-eighth, with a temperature of twenty-two degrees Fahrenheit, the maximum output of December 10, 1917, was slightly exceeded, being 129,417,000 cubic feet. Then followed a week of cold weather which according to the United States Department of Agriculture, Weather Bureau, was the worst ever experienced in the history of the country. On December twenty-ninth the *output* jumped to 143,676,000 cubic feet, or 25,548,000 cubic feet greater than the maximum previous to December, 1917; on December thirtieth the output reached 142,165,000 cubic feet, while on the same day in 1916 it had been only 96,264,000 cubic feet, and on December thirty-first the output was 145,026,000 cubic feet. The output on the last mentioned days exceeded the manufacture, and the company was compelled several times to draw on its reserve stock of gas. On January 1, 1918 (a holiday), the output dropped to 125,891,000 cubic feet, but on January second it increased again 10,000,000 cubic feet to 135,665,000 cubic feet, and was followed on January third by 135,304,000 cubic feet, on January fourth 136,353,000 cubic feet, on January fifth 126,212,000 cubic feet, dropping on Sunday, January sixth, to 111,301,000 cubic feet. The conditions were so serious that on December thirtieth the company officials called up the Commission and called its attention to the conditions, stating that they would be compelled to make all the coal gas possible irrespective of the effect it might have on candle power. A contract was let and about 300 workmen employed to fire up all the coal gas benches at the Fourteenth and Forty-second street plants; although at neither plant was there more than five days' coal supply running at full capacity. The entire *manufacture* of all the gas plants of the systems on December twenty-eighth was 126,639,000 cubic feet, and on the following day it was increased to 134,746,000 cubic feet, on December thirtieth to 137,255,000 cubic feet, on December thirty-first to 140,334,000 cubic feet, on January first to 145,477,000 cubic feet, or 20,000,000 cubic feet more than the output for that day. After that the manufacture was decreased in accordance with the

daily demand. The tremendous increase in the plant manufacture from 126,000,000 cubic feet to over 145,000,000 cubic feet was accomplished, according to the testimony of the gas system's chief engineer, only by extraordinary efforts. Extra men, steam shovels and automobile trucks were used at the various plants to assist in transferring coal from the storage piles, which in many cases were badly frozen up, as well as in removing the ashes from the plants which would otherwise have choked up all available space. The usual way of disposing of the ashes is by water transportation, but due to ice and the frozen condition of the river, tugs could not be hired. The company on December thirty-first called the attention of the newspapers and requested them to publish an item giving notice of the danger of a gas famine and requesting consumers to aid in every way in reducing the quantity of gas consumption.

After January 6, 1918, the daily output varied from a minimum of 118,848,000 cubic feet to a maximum of 136,312,000 cubic feet. In February the output was also variable. On February fifth the output jumped to the unprecedented figure of 150,537,000 cubic feet and fell the next day to 126,026,000 cubic feet and on the day after further to 116,033,000 cubic feet. This variation in demand is extraordinary, but notwithstanding that the record output of the system occurred on February 5, 1918, on which it was 35.62 per cent greater than in 1917, the output six days after dropped to 103,960,000 cubic feet, or 8.24 per cent less than the output on the corresponding day in 1917. All of the plants of the company increased the quantity of gas manufactured in December and January, varying as compared with the prior year in December from 24,238,000 cubic feet, or 20 per cent in the case of Ninety-ninth street, to 177,299,000 cubic feet, or 32 per cent at Ravenswood; and in January 53,266,000 cubic feet, or 43 per cent increase at Ninety-ninth street, to 189,525,000 cubic feet, or nearly 34 per cent increase at Ravenswood. The Central Union plant increased its coal gas manufactured in January 11.3 per cent, while Astoria increased its coal gas make to nearly 36 per cent.

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During the height of the gas stringency the Standard Oil Company was warned of the situation by the gas company and was requested to make proper arrangements to keep the plants of the companies supplied with oil. In December, 1917, the company used 14,498,705 gallons of oil as against 11,648,692 gallons in December, 1916, and in January, 1918, the company used 15,422,392 gallons of oil as compared with 12,018,384 gallons in January, 1917. In December, 1917, the company used 4.47 gallons of oil per 1,000 cubic feet of water gas as against 4.34 gallons for December, 1916; and in January, 1918, used 4.46 gallons per 1,000 cubic feet of water gas as compared with 4.36 gallons for January, 1917.

The fortunate ability of the Consolidated Gas System to secure for all its subsidiaries an adequate supply of oil during the period of stringency of supply strongly suggests an attitude of especial interest or favor on the part of the Standard Oil Company toward the Consolidated System. At the time the Standard Oil Company was finding itself able to fill the requisitions of the Consolidated and its subsidiaries, other companies within the city of New York were not faring so well. It appeared quite clearly, however, that perhaps because of this apparent disposition and ability on the part of the Standard Oil Company, the Consolidated Gas System, despite the unmistakable signs of an impending stringency in the supply of fuel materials, did not take the precautionary steps of providing, before December, 1917, an adequate supply of oil and coal to tide over a considerable part of the period of shortage.

The send-out of gas for the months of December to February, inclusive, was 10,800,641,000 cubic feet for 1917-1918 as compared with 9,004,385,000 cubic feet for 1916-1917. The New York and Queens Gas Company, controlled by the Consolidated Gas Company, was entirely cut off from navigation and was compelled to conserve its oil supply in accordance with such tank car deliveries as it could obtain and preparations were made for tank car delivery of gas oil from other works of the system. This company made efforts to cut and blast a channel in Flushing

bay to permit of oil delivery but was unable to do so. The Westchester Lighting Company was in the same position. It made efforts to break a channel in Eastchester creek by the use of a pile driver or dredge, and also employed men to dynamite a channel at the entrance to the creek. This company always receives its oil by water transportation, and in view of the exigencies of the situation it obtained some oil by tank cars for its Pelham plant by running a temporary oil line above ground to the railroad, a distance of 1,960 feet. To conserve the supply this company shut off all street lights in Westchester county and also obtained an additional supply of gas from other companies in the system at the city line.

BROOKLYN UNION GAS SYSTEM

The system has six manufacturing plants located in the borough of Brooklyn,—the Williamsburg, at the foot of North Twelfth street; the Nassau, at Kent avenue and Cross street; the Metropolitan, at Twelfth street and Gowanus canal; the Citizens works, at Fifth street and Gowanus canal; the Fulton, at Degraw street and Gowanus canal, and the Equity, at Newtown creek and Maspeth avenue. At these works, water gas is manufactured exclusively.

The send-out of the company for the months of December, 1917, to February, 1918, inclusive, in the winter of 1917-1918, was 5,711,007,000 cubic feet as compared with 4,730,619,000 cubic feet for the corresponding months of 1916-1917. In the period from December 9 to December 16, 1917, inclusive, the daily average was about 70,000,000, varying from 67,000 to 75,000 daily and representing an increase over the corresponding period in the previous year of about 32 per cent. In the period from December 24, 1917, to January 1, 1918, inclusive, the daily average was about 72,000,000, varying from 64,000 to 75,000 daily, and representing an increase over the corresponding period of the previous winter of over 35 per cent.

The use of 50,000 gallons of oil stored in each of the storage tanks of this company was prevented because of the height above

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the bottom of the tanks at which the suction pumps are constructed. This condition exists at the Citizens, Fulton, Nassau and Williamsburg works, but apparently not at the Equity works. There was some question as to whether or not this was good or negligent tank construction. The company claims that the suction cannot be placed at the bottom of the tank because of the probability of sucking air and thus preventing the oil from leaving the tank. On December 30, 1917, at the Metropolitan works about 200,000 gallons of oil were unavailable of a total on hand of 465,695 gallons, the tank containing more or less water which could not be separated because of abnormal weather conditions and frozen and broken pipes and connections, while in the other tanks about 100,000 gallons were unavailable. This left only about 165,695 gallons available for use. This same condition existed specifically on January 3, 1918, and February 8, 1918, and generally the major portion of the winter and prevented the use of about 500,000 gallons of oil on hand at the several works.

The company, however, claims that the primary cause of the reduction of oil per 1,000 cubic feet of gas manufactured was the lack of supply; that on one Sunday the shutting down of one of the works was prevented only by the timely arrival of a boat of oil sent to it.

The largest works of the system are the Williamsburg, Metropolitan and Nassau. On Sunday, December 30, 1917, the output of gas was 60 per cent greater than the output on the corresponding Sunday in 1916, and on that particular day the Williamsburg works had only about three days' available oil supply, the Metropolitan works had approximately one day's available oil supply, and the Nassau works had about three days' available supply, while the daily requirements of the Williamsburg works for oil amount to about 90,000 gallons a day, the Metropolitan works about 85,000 gallons a day and the Nassau works about 75,000 to 80,000 gallons. The supply on hand was abnormally small and the margin to work on unsafe. A minimum of ten days' reserve for each of these stations is considered a

normal reserve. From December 30, 1917, up to date of hearing on March 19, 1918, the oil supply of the system was short or inadequate. The normal oil supply was hindered by abnormal weather conditions, the harbor being blocked with ice, especially at the entrance of Gowanus bay, which prevented the delivery of supplies to Metropolitan, Citizens and Fulton works on Gowanus canal, Brooklyn. The winds were so high that boats could not cross the bay, and even when they could cross they were unable to tie up at the docks of the company on the East river supplying the Williamsburg and Nassau works. The Standard Oil Company employed an ice breaker to get its boats into the canal. The gas company endeavored as best it could to secure oil and all the oil secured was used. The supply of oil on hand on December 1, 1917, was 4,414,683 gallons and rapidly diminished during the month, about 8,315,000 gallons being consumed during the month. The danger point was reached about December 30, 1917. When the company officials realized the situation confronting them, they began to diminish the amount of oil used in the gas manufacture; and while the tests at the *gas works* for December, 1917, showed an average of about twenty-three candles, this apparently was not sufficient to produce twenty-two candle power at the city's *testing station*, a mile or more from the works. This gas system makes tests at the holders but not elsewhere, and except in so far as the city's tests may show, does not ascertain whether the statutory requirement is lived up to. The contract of the Standard Oil Company requires delivery of oil throughout the year whenever desired to meet the requirements of the system and is delivered on the orders of the system forwarded each week during the month. The system has no rail connections at any of its works and could not get the oil over land. The great quantity of oil used renders impossible the delivery by trucks of a supply sufficient to meet its purposes. The Standard Oil Company did not meet all the requirements of the system during this spell, offering as an excuse that it did not have the oil to meet all demands. Some of the reasons assigned by the Standard Oil Company were abnormal weather conditions,

difficulties with transportation, injuries to boats, and the commandeering of a number of its boats by the Federal Government. There was no other company from which the system could obtain oil.

The company claims to have made special efforts to provide for the supply of gas during the past winter by purchasing as much coal as it was possible to purchase, but so far as oil was concerned it appears to have relied upon its practice of effecting arrangements by the last of November, but it was not successful in filling its tanks during the fall of 1917.

KINGS COUNTY LIGHTING COMPANY.

The works of the Kings County Lighting Company are located at Fifty-fifth street and First avenue, Brooklyn, on the water front. The company manufactures carburetted water gas. During the recent winter the consumption was greatly in excess of that anticipated and, at the rate of increase experienced in recent years, would represent what would ordinarily have been estimated to be normal growth to 1927. In the maximum day of 1916, the company's output was 3,500,000 cubic feet whereas in 1917 the maximum day was over 6,400,000, or nearly double. The plant has productive capacity to send out about 320,000 to 325,000 cubic feet of gas an hour. This company had a holder capacity of about 2,500,000 at the pumping station, which is a mile and a half from the plant. The maximum reached for an hour during the past winter was about 540,000 cubic feet of gas, and this maximum continued until the company's reserve in the holders was about depleted and there was left only twenty to thirty minutes' additional supply, and, had the output continued at that rate, would have sucked in the crown of the holders and the plant would have had to shut down. On December 30, 1917, conditions were so severe that the company asked the police department and telephone company and all its own employees to notify consumers to conserve gas. Nearly all the company's employees were sent on a house to house canvass to ask consumers to conserve and the large consumers were

asked by telephone to cut down all possible consumption. The demand on the system was greater than the daily output almost during the entire months of December, 1917, and January, 1918, but in February commenced to ease up. The normal curve of the company's send-out is a peak load about 6 o'clock at night of around 3,500,000 cubic feet of gas, whereas the company during the past winter reached a load as high as 6,640,000 cubic feet. Ordinarily, the company has a chance to recover and make enough gas to fill its holders from 9 o'clock at night until about 6 o'clock in the morning, but the terrific send-out during the past winter kept up to about 11 or 12 o'clock at night and only gave a few hours for recovery. The tremendous demand for gas made absolutely necessary a reduction in pressure, the company believing it better to give everybody some gas of the best quality possible rather than give them all the gas they wanted for a limited time with the statutory quality and then have to shut down the plant.

The plant had, prior to the past winter, always been found adequate to supply the demand, but proved to be inadequate for such a demand as was made upon it during the winter of 1917-1918, and which, according to the ordinary growth of the past two years, would not have reached such proportions until 1927. The difficulty of this company during the past winter was attributable not only to lack of coal and oil, but in a large measure also to the inadequacy of the plant to carry the high load demanded. The company is now making preparations to increase its capacity and is making arrangements to secure the necessary equipment to take care of just such a contingency as arose this past winter. The equipment needed is additional station meter, exhauster and boiler capacity. The additional boiler capacity to be installed is 500 horse power. The plans did not include an increase to the holder capacity, the company figuring that with the increased exhauster capacity it would be able to take care of a condition such as arose this past winter. The meters, exhauster and boilers, principally boilers, were the weakest spots in the plant during the past winter.

The additional boilers have been ordered, plans have been prepared to extend the buildings, and it was the company's stated intention, as soon as the proposals have been received for erection of a new stack, to have the work done during the coming summer. The company's manager assured the Commission that, unless labor conditions were such as to prevent contractors from executing their work or delivering the apparatus ordered, the company next winter would be in a position to take care of a similar demand such as was made during the past winter.

Prior to January 1, 1918, the Kings County Lighting Company received its supply of oil from the Texas Oil Company, which failed to make the necessary deliveries during December, 1917, but since that time the lighting company has had arrangements with the Standard Oil Company for the supply of oil. Deliveries by the Standard Oil Company were, however, also irregular and uncertain and were hampered by the same natural obstacles as those of the predecessor purveyor. During the cold spell the works at Fifty-fifth street and First avenue were practically isolated, the slip being frozen up almost continuously from the middle of December, 1917, until about February 22, 1918. The slip was so blocked up with ice during the month of January, 1918, that the tow-boat operators would bring no boats into the slip unless the gas company guaranteed the insurance or guaranteed the barge or tugboat against all loss and damage.

During the month of December, 1917, the company received only three boat loads of coal (aggregating 2,100 tons), in January, 1918, only one boat load (780 odd tons) and in February, 1918, three boat loads. On January 10, 1918, the company was down to about four days' supply of coal. The normal daily consumption during December, 1917, was between 100 and 125 tons of anthracite. The company had about 5,000 tons on hand December first, about 4,500 tons of which was an old supply of coal lying in the yard outside of the hoppers for about four years. The hoppers have a capacity of between 4,500 and 5,000 tons of coal, and for proper operation about 1,500 to 2,000 tons of coal are necessary. The coal in the yard had been there so long

that it was practically solid coal and had to be mined all over to get it on the generator floor or into the hoppers.

Labor was scarce. A contractor was employed to move the coal from the yard into the hoppers. Scaffolding was erected on the side of the hoppers to permit this moving. Many of the company's employees were put to work with the contractor to handle this coal. The company normally, with a plant of the size they have, should carry on hand a constant supply of approximately 10,000 tons of coal, about 5,000 of which should be kept as a reserve.

The company's manager testified that the company had been unable to enter into any written agreement for the delivery of coal for the coming winter.

BROOKLYN BOROUGH GAS COMPANY

This company supplies Coney Island with gas. It has two distribution holders and one small holder located at the works on Coney Island creek, and manufactures carburetted water gas. Normally, the peak gas demand of the year is in the summer time, but during the last winter the peak load reached the usual summer peak load.

The following table shows the monthly send-out of gas in thousand cubic feet for the months of December, January and February of the recent winter as compared with the same months in the previous winter:

December, 1916	38,629
January, 1917	37,841
February, 1917	35,875
December, 1917	55,843
January, 1918	60,860
February, 1918	49,033

The company's plant was sufficient at all times to meet the peak demand during the winter, as it has a large plant which is necessary to care for the summer peak traffic. The plant was in fact operated to absolute capacity. The illuminating and heating

potency of the gas during this period was at times much reduced, because the company was unable to obtain the necessary oil to maintain an adequate candle power. The pressure was also affected. The weather conditions alone, however, were not responsible for the failure of the company to live up to the pressure requirements of the Commission's order, as the transmission system of the company was not adequate to provide the necessary pressure. The small supply of oil obtainable by the company made it necessary, in order to give any gas service, at periods to reduce the amount of oil ordinarily used in conforming to the candle power requirement of the statute. If the usual amount of oil had been used in the gas the people in the district supplied by this company would have been without gas for nearly a third of the time during the winter. At no time was the plant shut down, but it warned its customers in every possible way to reduce the consumption and also requested the city authorities to conserve gas for municipal lighting.

From December 31, 1917, to February 28, 1918, the company never had on hand more than four to five days' supply of oil. Prior to the past winter and since the works were built in 1908 the company has always received its supply of oil by way of Coney Island creek in barges, with a capacity of about 75,000 gallons. The creek has never during those years been frozen for more than eight or ten days and there was never any necessity for any other method of oil delivery. During the recent winter, however, the company was compelled at times to bring oil by car over the Long Island railroad to South Brooklyn, taking all the oil that the Standard Oil Company could supply. The deficiency in the supply of oil was not due to any failure on the part of the company to contract for it, for the company's contract with the Standard Oil Company called for a supply which would have been sufficient had it been delivered.

The failure in the coal supply, owing to the freezing of the creek, created such an acute situation that, at one time, the company hired men to thaw the ice in the creek and to haul a coal barge 500 yards up the creek in order to get coal to the yard. At the time the company had only twenty tons in the yard.

NEW YORK AND RICHMOND GAS COMPANY

The New York and Richmond Gas Company has three distributing holders and one relief holder, the main storage holder, one distributing holder and a relief holder being located on Willow avenue, Clifton, and the district holder on Post avenue, West Brighton. The company manufactures carburetted water gas.

The oil supply was very poor, and, as a result of the unprecedented demand for gas during the latter part of December, 1917, and the early part of January, 1918, the company ran entirely out of oil on January fourth at 3 A. M. and did not obtain a supply and could not resume operations until 12 o'clock the following day. The company had enough coal on hand to meet all necessary requirements. This company also secures its oil from the Standard Oil Company of New Jersey. The company has ample storage capacity and uses about four and two-tenths gallons per 1,000 cubic feet on an annual average, which is about the average most of the companies in the first district use.

On some of the days in these months broken coal was used in addition to the buckwheat and on certain other days soft coal was used in addition to the buckwheat. No buckwheat coal was used from January 1, 1918, to January 8, 1918, the coal pile being frozen, and no buckwheat coal was used from February 4 to February 19, 1918, because freight cars were not coming in.

This company had considerable difficulty with gas manufacture because of the poor grade of coal supplied which reduced the capacity of the plant to a considerable extent, and the company was compelled to operate under this condition for some time and actually brought the matter to the attention of the National Fuel Administrator to secure relief. The company has no coal contract, having been unable to obtain one, but has been supplied by a company which has met the requirements for ten years past.

QUEENS BOROUGH GAS AND ELECTRIC COMPANY

The works of the Queens Borough Gas and Electric Company are located at Rockaway Beach at the foot of Thetis avenue and Jamaica bay, Queens borough, and the holders are located at the gas works at Far Rockaway, in the same borough, and at Lyn-

brook, in Nassau county. The company supplies the fifth ward, borough of Queens, and a number of towns in Nassau county.

The output of gas for December, 1917, was approximately 19,000,000 cubic feet; for January, 1918, 26,872,700 cubic feet, and for February, 1918, 21,799,000 cubic feet, while the send-out for December, 1916, was 22,916,700; January, 1917, 22,282,100, and February, 1917, 20,305,600, a considerable increase for the last winter over the preceding winter.

The plant, equipment and mains of this company were ample to supply the greater demand made during the past winter but the availability of so large a capacity is due to the fact that the plant is prepared to meet the greatest demand which usually occurs in the summer months when the company has three or four times the output ordinarily that it has in the winter months.

Unique among all the gas companies in the city of New York, this company experienced very little difficulty with its coal and oil supply because it had followed its practice of securing in the early part of December its supply for the entire winter. The oil tank capacity of the company (350,000 gallons) is a very large one considering its output, and under usual conditions would carry the company through the winter for three or four months. The president stated that the provision of so large a capacity was prompted by conference with a Standard Oil Company official who urged that a better price and better delivery could be obtained by the company with the larger reserve tanks. The company also considered it wise to have a large storage capacity for oil because the harbor often froze up through the winter and made it impossible to bring any oil after December fifteenth and until March first. It is a much more difficult task to get barges to this company's works at Jamaica bay than it is to get barges to the city docks. Anticipating the adverse effects of war conditions, the orders of the company for coal and oil for the 1917-1918 winter season were somewhat in excess of other years, and a supply was secured sufficient to last until some time in May, 1918.

At the time of the hearings, the company had no contract for oil as its last one with the Standard Oil Company of New Jersey

had expired in March, 1918, and the company had been unable to close another one. As a result, the company was beginning to experience difficulty in securing oil.

The company had coal delivered in the early part of December, 1917, but none in January and February, 1918. Like the supply of oil, its supply of coal was secured in advance and in sufficient quantity to meet the service requirements of its winter business. Although the company had already begun to experience difficulty in securing oil, it had, at the time of the hearing, no difficulty in securing coal.

BRONX GAS AND ELECTRIC COMPANY

The Bronx Gas and Electric Company operates mostly in a suburban part of the borough of The Bronx. Its works are located on Westchester creek, by which route the company depends for its supply of oil and coal. For the first time in the history of the company Westchester creek was frozen solidly on or about December 26, 1917, preventing navigation continuously until February 15, 1918. The statistics of the company's output, demand and fuel supplies were not placed in evidence, but a general idea may be formed from the testimony that on December 29, 1917, the output increased by 54 per cent over the same day in the preceding year.

The last cargo of oil, amounting to about 124,000 gallons, was received by way of Westchester creek on December 12, 1917, filling the company's oil storage tanks and it was not until February 21, 1918, that another cargo of oil amounting to about 125,000 gallons was received replenishing the company's stock. On January 1, 1918, the company had on hand only about 90,000 gallons of oil, ordinarily sufficient for about twenty-five days' operation under normal conditions. The send-out of gas, however, as a result of the great demand due to the extreme cold weather and the use of gas heating appliances, greatly increased over the send-out of previous years, the increase on December 29, 1917, being 54 per cent over the same day of the previous year, and the effect was a greatly increased use of gas oil by the company over normal operation. The danger of the shortage of oil soon became

apparent to the officers of the company, and they decided that under the then existing conditions a reduction in the amount of oil per 1,000 cubic feet of gas produced was necessary, for otherwise within a short time the company would be unable to supply any gas at all. Accordingly, for a time the use of oil was reduced about one gallon per 1,000 cubic feet of gas produced, which resulted in a reduction in the illuminating value of the gas, but the company still left sufficient oil in the gas, about three and one-half gallons per 1,000 cubic feet, to give what it claimed to be a good heating value.

While the creek was frozen over the company endeavored to obtain its oil by rail instead of by the usual method of water freight despite the serious inconveniences that would result therefrom, the nearest available railroad siding being a distance of about two miles from the company's works and delivery of the oil by tank cars being necessary under the circumstances. In this way the company was able to obtain some oil, but the deliveries were, nevertheless, very irregular and uncertain owing to car shortage and railroad congestion. After the arrival of the second cargo of oil on February 21, 1918, the company returned to its usual mode of operation and endeavored to maintain the statutory candle power in the gas. The company in its twenty years of experience has always found its supply of oil in the winter time sufficient to carry it over any possible period of a freeze-up of navigation or the closing of navigation with the exception of the past winter.

The company also experienced a coal shortage owing to the scarcity of available coal due to the railroad congestion and extreme cold weather.

The Commission cannot avoid the conclusion that, if the failure in the supply of coal and oil had not occurred and the gas companies had not been obliged to resort to various expedients to produce required quantities irrespective of quality, the complaints of consumers would have been far less in number than they actually were. On the other hand, the public hardly realized how valiant were the companies' efforts to prevent a breakdown of the gas

service in the city of New York. While much greater preparations than were made by most of the gas companies to anticipate any abnormal demand was possible, these preparations in most cases cannot be sufficient to extend over the needs even of a normal winter gas service. In the case of smaller companies, especially those whose peak demand occurs in the summer and which possess, therefore, ample storage capacity for normal winter demands, a reserve supply of fuel may be stored to suffice for any contingencies of sudden abnormal demand or of normal demand for the greater part of a season. But, in the case of the large systems, a similar reserve for the period of maximum demand would require facilities which they do not now possess and which cannot be made available soon enough. Foresight required much greater preparation for the eventualities than were in fact made. Conservation of fuel may be a war necessity which may reduce the requirements of the forthcoming winter, but the experiences of last winter demonstrate the need for a fuel budget for which arrangements should be planned and made long before the actual need arises.

COMPLIANCE BY COMPANIES WITH CANDLE POWER STATUTE

Gas corporations are required under chapter 125, Laws of 1906, as amended by chapters 604 and 612, Laws of 1916, to furnish to consumers in the city of New York gas of an illuminating power of not less than twenty-two sperm candles *tested at a distance of not less than one mile from the distributing holder*, and are also required under chapter 736, Laws of 1905, to supply to the city of New York gas of the same quality. The Greater New York Charter, section 522, provides for the inspection by the commissioner of water supply, gas and electricity of the city of New York of *illuminating gas* manufactured within the city or furnished or sold to the city or to any consumer therein, and for the making of daily tests with reference to the illuminating power, pressure and purity thereof.

The commissioner of water supply, gas and electricity, under and in pursuance of the last-mentioned statute, has established in

the various boroughs of the city stations wherein tests are made daily by employees of his department and the records thereof are duly filed in his office. These tests are made not only with reference to the illuminating power, pressure and purity, but also to the heating power of the gas. The Commission has in late years co-operated with the department of water supply, gas and electricity in the making of these tests.

The mains of the Consolidated Gas System in the boroughs of Manhattan, The Bronx and Queens are interrelated, as are the mains of the Brooklyn Union System in the boroughs of Brooklyn and Queens and it is impossible to determine from what point the gas tested actually comes or by what particular company or branch in the system the gas was manufactured and to what consumer or group of consumers or territory it might be delivered. The department of water supply, gas and electricity and the Commission, realizing this state of affairs, have after careful consideration located their stations at sufficiently widened and scattered parts of the boroughs in order to secure a fair average of the gas that is being furnished to the inhabitants of those boroughs.

The tests made by the department of water supply, gas and electricity in conjunction with the Commission of the illuminating value in candles of the gas supplied by the various companies in the city of New York for the months of December, 1917, and January and February, 1918, show conclusively that all of the companies, with the exception of the Queens Borough Gas and Electric Company, did not meet the candle-power requirements during the past winter, particularly in the months of January and February, 1918, when the candle power supplied by such companies, excepting those embraced in the Consolidated System, was greatly below twenty-two candles. A short table showing the average monthly candle power of the gas supplied by the companies during the months of December, 1917, and January and February, 1918, as well as the heating value of the gas in British thermal units for December, 1917, and January, 1918, follows. The tests cover all companies in the city except the Northern Union Gas Company of the Consolidated System, and were made

every day in the months of December, 1917, and January and February, 1918, except on Sundays and holidays and on a few other days when tests were impossible because of the freezing of the services at the testing stations.

CONSOLIDATED SYSTEM

COMPANY	C. P. Dec.	B. T. U. Dec.	C. P. Jan.	B. T. U. Jan.	C. P. Feb.
Consolidated Gas Company.....	22.1	678	20.9	673	20.70
New Amsterdam Gas Company.....	22.1	679	20.6	674	20.58
New York Mutual Gas Light Company.....	19.8	651	19.2	646	18.98
Standard Gas Light Company.....	22.6	680	20.8	678	20.97
Central Union Gas Company.....	20.5	675	20.0	668	19.22
New York and Queens Gas Company.....	22.0	663	17.4	635	18.01
Average for system.....	21.8	675	20.4	670	19.74

BROOKLYN UNION SYSTEM

Williamsburg Branch.....	21.2	629	14.3	566	15.22
Naassu Branch.....	21.3	630	14.2	562	15.81
Fulton Branch.....	16.4	592	11.0	555	13.65
Citizens Branch.....	19.0	623	12.8	568	12.74
Metropolitan Branch.....	20.6	616	14.8	569	15.83
Average for system.....	19.7	615	13.4	563	14.85

OTHER COMPANIES

Bronx Gas and Electric Company.....	22.3	693	15.3	595	13.29
Kings County Lighting Company.....	21.4	635	15.6	587	14.11
Brooklyn Borough Gas Company.....	20.6	638	11.3	556	13.00
Queens Borough Gas and Electric Company.....	22.8	673	23.4	*	22.92
New York and Richmond Gas Company.....	18.6	629	16.5	616	16.76
Average all companies.....	21.2	663	17.9	640	16.86

* No record.

All of the companies maintain their own testing stations at their works or holders, but only a few of them maintain testing stations a mile or more from the works or holders, which is the distance prescribed by the statute for testing purposes. The officials of the companies testified that the tests of the gas leaving the works or the holders (with few exceptions) showed an average monthly candle power of over twenty-two candles. It is essential, however, that the gas leaving the works or holders have a candle power above twenty-two because a sudden drop in temperature produces a condensation which affects the gas in the mains, causing a loss in candle power. There is also a loss in candle power resulting from friction and the pressure at which the gas is transmitted.

In summer sudden changes in temperature are not as common as in the winter and the loss in candle power is usually much less than in winter. The loss in candle power in transmission during the winter time averages about three or four candles, which makes necessary the manufacture at the works of a candle power of approximately twenty-six or over in order to meet the statutory requirements. This is easily possible with an adequate supply of oil. The candle power of gas delivered depends absolutely upon the amount of oil used. The annual average of oil used in the city of New York in manufacturing 1,000 cubic feet of gas is about four and two-tenths gallons. The amount used in the winter, however, runs up to about four and one-half gallons per 1,000 cubic feet. But during the past winter, the oil used for enriching purposes was in most cases much below the quantity necessary to insure compliance with the statute.

Candle power is of importance for illuminating purposes only when open flame burners are used, and has no practical significance in connection with illumination by mantle lamp and is inconsequential where gas is used for heating and cooking purposes except as heating power might be concomitant of candle power. As a general rule gas of lower candle power will contain less heat units than gas of a higher candle power manufactured by the same process. The heating value of the gas supplied by the Brooklyn Union System and other companies where the candle power was considerably below twenty-two showed a very considerable drop as shown by table on page 50. Heat is the all-important thing in mantle lighting and in the use of gas for heat and cooking. Illumination by mantle lamps depends not on candle power but on the temperature of the mantle, and the intensity of the heat is the principal factor in providing light with mantle lamps. The number of users of the open flame burners in the city of New York has been estimated as at least 20 per cent of the inhabitants. The failure of the companies, therefore, to comply with the candle power requirements of the statute seriously affected users of open flame burners so far as illumination was concerned but had no effect on the consumers using mantle lamps or heating and cooking

appliances. During the cold spell, heat rather than candle power was the important element in the consumption of gas, and in that respect very little complaint could be found with the gas.

Concerning the candle power tests of gas distributed by the Consolidated Gas System, it was observed that at four of the seven stations of the Consolidated Gas Company the tests showed a monthly average for December, 1917, slightly below twenty-two candles; that at one of the two stations of the New Amsterdam Gas Company the tests showed slightly below twenty-two candles, and that the monthly average of the New York Mutual Gas Light Company was only nineteen and eight-tenths candles and of the Central Union Gas Company only twenty and one-half candles, while the monthly average for all companies in the system taken as a whole was only twenty-one and eight-tenths candles. The daily average for the entire system was above twenty-two candles only on ten days of the twenty-five days on which tests were made. In January, 1918, the tests at all of the stations of all of the companies in the system showed a monthly average below twenty-two candles and the monthly average for all companies was only twenty and four-tenths candles. In February, 1918, the tests at all of the stations of all the companies in the system showed a monthly average below twenty-two candles and a monthly average for all companies of nineteen and seventy-four one-hundredths candles. The daily average for the entire system was below twenty-two candles every day in January (with two exceptions) and February, 1918.

Of the tests of gas supplied by the Brooklyn Union System, it is noticeable that at all of the branches the tests for the months of December, 1917, and January and February, 1918, showed a monthly average below twenty-two candles, the monthly average for all branches for December, 1917, being nineteen and seven-tenths candles, for January, 1918, only thirteen and four-tenths candles (almost nine candles below the statutory requirements), and for February, 1918, only fourteen and eighty-five one-hundredths candles (more than seven candles below the statutory requirement). It is noticeable that the daily average candle

power of the system as a whole for every day in December, 1917, and January and February, 1918, was below the statutory requirement of twenty-two candles.

Relative to the other gas companies within the city of New York and not included in the Consolidated or Brooklyn Union Systems, it is noticeable that the monthly average of the Queens Borough Gas and Electric Company for all months was above the statutory requirement of twenty-two candles, while the monthly average of all other companies (excepting Bronx Gas and Electric Company for December, 1917) was below the statutory requirement, particularly in January and February, 1918, when the daily average was far below twenty-two candles.

The test shows persuasively that gas furnished was deficient in the quality prescribed by statute and was below the statutory requirement of twenty-two candles. A large number of consumers from The Bronx and several from Brooklyn attended at the hearings and some of them testified concerning the conditions at their homes and generally in their neighborhood during the recent winter and were vigorous in their denunciation of the gas companies for the poor quality of gas furnished. The witnesses testified that it was difficult and practically impossible at times to read newspapers or books in the evening and that other means of illumination had to be provided by them. These consumers also stated that, while the gas furnished was the poorest in quality in many years, nevertheless the bills rendered by the companies were much higher than in the same months of previous winters. The complaints of the consumers were justified. Under the law the gas companies are absolutely required to furnish a minimum candle power of twenty-two candles and a maximum price is fixed for 1,000 cubic feet of gas furnished. The Legislature undoubtedly fixed this charge upon the basis of the companies furnishing an illuminating gas of a minimum candle power of at least twenty-two candle power. Matter of Service Standards of Gas Corporations, 8 P. S. C. R. (1st Dist. N. Y.) 250.

The gas company officials at the hearings candidly admitted failure at times to comply with the candle-power requirements

of the statute during the past winter, but claimed that the deficiency was due to uncontrollable causes such as extreme cold and abnormal atmospheric conditions, bringing on not only a tremendous increase in the consumption of gas over previous winters but also the interferences with delivery at water points of coal and oil.

But the evidence of the officials themselves shows that the companies' failure to live up to the requirements of the candle power statute was due not so much to the extreme cold weather as it was to their lack of foresight or to inability to provide an adequate reserve of coal and oil to tide them over the winter season. The Queens Borough Gas and Electric Company alone complied throughout the winter with the requirements of the candle power statute, and this was due entirely to the practice followed by that company of getting all of its coal and oil for the entire winter in the early part of December. This company also complied in full with the requirements of the order of the Commission concerning pressure regulations. This company maintains a very large oil tank capacity considering its output. This oil tank capacity permits the company to have on hand the early part of December not only an adequate supply of oil for the entire winter but also enables the company to obtain better prices and better delivery on its oil than many and possibly all of the other companies. Of course the company can more easily than other companies provide the facilities for the winter reserve, as its peak business occurs in the summer time and it has excess facilities available during the winter.

The Consolidated Gas System did not furnish any figures as to the amount of oil and coal on hand during either the last winter or the preceding winter, but it is plain to be seen from its own story that an adequate supply of oil and coal to supply an entire winter demand was not on hand the early part of December, 1917. The system later experienced considerable difficulty, and it was only by the exercise of extraordinary efforts that it was able to accommodate the demand put upon it. This system maintained a higher candle power (although below the statutory requirement for

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December, January and February last) than that of all other companies excepting the Queens Borough Gas and Electric Company. This is undoubtedly due to the favor enjoyed by the system with the Standard Oil Company, which was able to furnish all of the oil required despite the other demands, while unable or unwilling to furnish a sufficient supply of oil to the other gas companies within the city of New York. The system should have been able to comply fully with the statutory requirement during the entire winter, since it used the requisite amount of oil and even a greater amount of oil per 1,000 cubic feet of gas than it had used in the corresponding months of the previous winter. The highest demand ever made upon the Consolidated Gas System in one day appears to have been that of February 5, 1918, when the output was 150,537,000 cubic feet. The plant of the Consolidated System was adequate, it appears, to meet the great demand put upon it. On January 1, 1918, the system manufactured as high as 145,477,000 cubic feet of gas and it does not appear that the full capacity of the plant had been reached. The send-out of the system from December 1, 1917, to February 28, 1918, was 10,800,641,000 cubic feet of gas as compared with a send-out of 9,004,385,000 cubic feet for the corresponding period in the previous winter, or in other words an increase of approximately 20 per cent. The lack of foresight or the oversight of the officials of this company in not providing an adequate supply of oil for the entire winter in the early part of December is shown by the fact that as early as December 17, 1917, the Mutual plant of the system was compelled to shut down temporarily because its reserve stock of oil had been exhausted.

The Brooklyn Union Gas System failed woefully to live up to the requirements of the candle power statute due to its failure to provide an adequate reserve of coal and oil for the winter supply of gas. The oil consumed by the system in the manufacture of gas from December 1, 1916, to February 28, 1917, was 20,059,592 gallons and yet according to the system's own statement it had available at its various works on December 1, 1917, only 4,414,683 gallons of oil, approximately 20 per cent of the amount

of oil used in the manufacture of gas in the preceding winter. A considerable portion of this supply was not available because of the tank construction at the works of the system. It appears that pump suction lines are laid at such a height above the bottom of the tanks at the Citizens, Fulton, Nassau and Williamsburg works, as to prevent the use at each of these works of about 50,000 gallons of oil. The lack of availability of such a great quantity of oil does not seem to have existed at the works of the various other companies operating in the city of New York. Changes should be made in these tanks to reduce to a minimum the amount of oil unavailable. The plant of this company appears to have been adequate to meet the demands made upon it during the recent winter. The difficulty experienced by this company was with lack of oil, an adequate supply of coal having been on hand to meet the demand for the entire winter. The company consumed 72,630 tons of coal from December 1, 1916, to February 28, 1917, and had on hand on December 1, 1917, 91,898 tons, of which only 89,170 tons were used during the corresponding period this last winter.

The Kings County Lighting Company experienced serious difficulties in meeting the demand put upon it during the past winter, due in large measure to lack of boiler and exhauster capacity. The company failed to provide on hand in the early part of December, 1917, an adequate supply of oil and coal. The oil consumption of December 1, 1916, to February 28, 1917, was 1,339,853 gallons and yet on December 1, 1917, the company only had on hand 394,549 gallons of oil or approximately only 25 per cent of the amount of oil used during the preceding winter. The coal consumption from December 1, 1916, to February 28, 1917, was 6,474 tons of coal, and yet on December 1, 1917, only 5,095 tons of coal were at the company's works, of which 4,500 tons was an old supply that had been lying in the yards outside the hoppers for about four years. This coal had been in the yard so long that it had to be mined all over again and a considerable portion of it could not be used in the generation of gas. There was a time when the company because of the

great demand for gas and the tremendous output was in danger of shutting down, the holders being threatened with destruction by the sucking in of the crowns.

The plant of the Brooklyn Borough Gas Company was adequate to supply the demand made upon it, but due to lack of oil was unable to live up to the requirements of the candle power statute. The company has not adequate equipment to comply with the pressure regulations of the Commission's order. The oil consumption from December 1, 1916, to February 28, 1917, was 475,761 gallons and yet on December 1, 1917, the company had on hand only 54,227 gallons of oil or less than 15 per cent of the amount of oil used the previous winter. The coal consumption from December 1, 1916, to February 28, 1917, was 1,929 tons and the company had on hand on December 1, 1917, only 16,116 tons.

The New York and Richmond Gas Company failed on candle power as well as on pressure. Its system is not adequate to comply with the pressure regulations of the Commission's order and improvements are necessary. The company claims that, because of topographical conditions, it is unable, even in normal periods, to comply with the candle power statute, but it was shown that in the year 1916 it furnished a twenty-two candle power on the service. The difficulty of this company in respect to coal and oil was due to the same lack of foresight as of other companies. The oil consumption from December 1, 1916, to February 28, 1917, was 513,117 gallons, and yet on December 1, 1917, the company had on hand only 97,799 gallons, approximately 18 per cent of the amount used the preceding winter. The broken coal consumption from December 1, 1916, to February 28, 1917, was 1,819 tons and the company had available on December 1, 1917, only 1,047 tons, somewhat over 50 per cent of the amount consumed the previous winter. The buckwheat coal consumption from December 1, 1916, to February 28, 1917, was 1,884,361 pounds and yet on December 1, 1917, the company had on hand only 412,053 pounds, or less than 25 per cent of the buckwheat coal consumption the preceding winter.

The plant of the Bronx Gas and Electric Company was adequate to supply the demand made upon it, but it labored under the same difficulties as other companies,—lack of oil. The candle power requirements of the statute were not lived up to, but it is evident that the candle power statute could have been complied with if the company had had on hand in the early part of December, 1917, a supply of oil equal to the amount of oil consumed during the preceding winter.

The facts in regard to the fuel supply and the consequences of a failure to secure as large a reserve as possible have been impressively shown. The execution of the arrangements effected by the Federal government with certain of the large gas plants in the city of New York for the production of ingredients essential for munition purposes will necessitate changes in the candle power quality of gas furnished by those companies, but the Commission has by order in Case No. 2235 issued October 13, 1917, fixed the terms and conditions under which the companies may freely carry on the work for the government without imposing upon the consumers an increase in the charges for service of equivalent efficiency. 8 P. S. C. R. (1st Dist. N. Y.) 250.

HEATING POWER OF GAS

While not of vital importance in this inquiry, the evidence affords an interesting comparison between the heating value of the gas supplied by the companies during the recent winter and the illuminating value. The companies have usually contended that there is no exact relation between a lighting and heating content of gas, but it is noticeable that the twenty-two candle power gas invariably produces a heating content of approximately 650 British thermal units and over. Recently the Commission, in view of the national emergency concerning toluol, adopted an order in Case No. 2235 giving the companies the option to adopt as a standard for the furnishing of gas to consumers in the city of New York a thermal content of 650 British thermal units per cubic foot in lieu of a gas of the statutory candle power, to be furnished at the statutory rate, and further providing that, if the thermal con-

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tent be reduced, a discount shall be allowed on the bills for gas to consumers equivalent to the reduction in thermal content from the standard fixed by the order. Matter of Service Standards of Gas Corporations, 8 P. S. C. R. (1st Dist. N. Y.) 250. None of the companies exercised the option of substituting a heating power gas for a candle power gas.

The tests of the department of water supply, gas and electricity placed in evidence and above referred to show that the monthly average heating value for December, 1917, of the gas supplied by the Consolidated System was 675 British thermal units with a monthly average candle power of twenty-one and eight-tenths; the monthly average heating value of gas supplied by the Brooklyn Union System was 615 British thermal units with a monthly average candle power of nineteen and seven-tenths; the monthly average heating value supplied by the Bronx Gas and Electric Company was 693 British thermal units with a monthly average candle power of twenty-two and three-tenths; the monthly average heating value supplied by the Kings County Lighting Company was 635 British thermal units with a monthly average candle power of twenty-one and four-tenths; the monthly average heating value supplied by the Brooklyn Borough Gas Company was 638 British thermal units with a monthly average candle power of twenty and six-tenths; the monthly average heating value supplied by the Queens Borough Gas and Electric Company was 673 British thermal units with a monthly average candle power of twenty-two and eight-tenths; the monthly average heating value supplied by the New York and Richmond Gas Company was 629 British thermal units with a monthly average candle power of eighteen and six-tenths. The average heating value supplied during this month by all companies was 663 British thermal units with an average candle power of twenty-one and two-tenths.

The tests of the department showed that in the month of January, 1918, the Consolidated System furnished gas containing an average of 670 British thermal units with a monthly average candle power of twenty and four-tenths; the average heating value

for the month of January, 1918, furnished by the Brooklyn Union System was 563 British thermal units with an average candle power of thirteen and four-tenths; the average heating value supplied by the Bronx Gas and Electric Company during this month (tests taken on thirteen days only) was 595 British thermal units with an average candle power of fifteen and three-tenths; the average heating value of the Kings County Lighting Company was 587 British thermal units (tests taken on thirteen days only) with an average candle power of fifteen and six-tenths; the average heating value of the Brooklyn Borough Gas Company was 556 British thermal units with an average candle power of eleven and three-tenths. No tests were made for the Queens Borough Gas and Electric Company as to heating value that month. The average furnished by all companies (the Queens Borough Gas and Electric Company excepted) during January, 1918, was 640 British thermal units with an average candle power of all companies of only seventeen and nine-tenths.

These tests confirm the judgment of the Commission in Case No. 2235 as to the average thermal content of gas furnished by the companies in the city of New York under the requirement of twenty-two candle power. The companies acknowledged, in a prior hearing before the Commission (Case No. 2066) to determine and fix the standard for the measurement of illuminating and heating power of gas, that the adoption of a British thermal unit standard would give the greatest number of materials available for gas-making purposes and would result in the greater simplicity in gas manufacture and that ultimately the new standard would work for the benefit not only of the consumer but of the gas companies and would also result in a considerable saving in the use of gas oils now used by the companies primarily for increasing the candle power of gas and would thus reduce considerably the cost of manufacture.

COMPLIANCE BY COMPANIES WITH PRESSURE ORDERS

This Commission, under the provisions of the Public Service Commissions Law, has at various times, after hearings, prescribed

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regulations governing pressure of gas supplied to consumers in the various boroughs of the city of New York, and has required and directed the various gas corporations in each of said boroughs to provide and maintain recording pressure gauges of a type to be approved by the Commission so located that no gas consumed will be more than 3,800 feet in an air line from the nearest gauge upon the distributing system by which he is supplied, and that there will be at least one gauge in each square mile of territory supplied by each corporation, and specifying the minimum pressure of gas, the maximum pressure of gas, the maximum daily pressure variation (independent of momentary and pulsating variations of pressure), the maximum momentary pressure variation, and the maximum pulsating pressure variation. These pressure regulations were prescribed as follows: On June 21, 1912, in Case No. 1480, as to all gas companies in the borough of Manhattan; on January 24, 1913, in Case No. 1577, as to all gas companies in the borough of Brooklyn (excepting the thirty-first ward), and on July 8, 1913, as to all gas corporations in the thirty-first ward; on December 17, 1912, in Case No. 1578, as to all gas corporations in the borough of The Bronx; on January 24, 1913, in Case No. 1597, as to all gas corporations in the borough of Queens; and on December 10, 1912, in Case No. 1580, as to all gas corporations in the borough of Richmond. At the present time the companies are required under said orders to maintain a minimum pressure of gas of not less than two inches water column on two consecutive days, a maximum pressure of not exceeding six inches water column on two consecutive days, the maximum daily pressure variation not to exceed two inches water column on two consecutive days, the maximum momentary pressure variation not to exceed eight-tenths inches water column on two consecutive days and the maximum pulsating pressure variation not to exceed five-tenths inches water column on two consecutive days. All of the pressures are to be measured at the consumers' end of the companies' service pipe. The companies are required when unable to maintain the minimum pressure on account of causes beyond their control to immediately notify the Commission and request

an extension of time within which to comply with the provision of the order. A variation is permissible in the maximum pressure where a consumer or consumers supplied from the service pipe makes a specific request in writing to the company or companies furnishing the gas for pressure of or in excess of said six inches.

Proper and adequate pressure is one of the most important of service conditions. A variation in the pressure will cause trouble in the use of the consumers' appliances which are generally adjusted for a certain pressure. In order to promote the efficient use of appliances a certain minimum pressure must be had. The important danger to be guarded against, so far as pressures are concerned, is a sudden drop with a subsequent rise to normal, which sometimes occurs. Such a sudden drop may extinguish lights or the flames in fixtures and appliances, and, if gas cocks are not turned off, upon a subsequent increase of pressure the room will fill with unburned gas with attendant danger of fire and asphyxiation. Where cooking appliances are adjusted to a certain pressure and there is a sudden drop in the pressure there is a danger of a flashback with the consequent lighting of the gas in the orifice feeding the range, which results in the production of carbon monoxide in the room. There is very little chance of the light in a fixture or range being extinguished at pressures above one inch. Mr. Addicks, engineer of the Consolidated Gas System, testified that the maintenance of a pressure as low as one-tenth of an inch would be sufficient to keep gas burning in an open flame burner and this statement remains undisputed. The data submitted by the companies showing pressure as indicated by charts taken from their permanent recording pressure gauges shows (except in rare instances) that the minimum pressure of the gas never went below one inch and it is therefore reasonable to assume that none of the cases of gas poisoning from open flame burners were due to any failure on the part of the companies to live up to the pressure requirements of the Commission's orders. The prime reasons for the establishment of pressure regulations are safety and service. The Commission made a thorough investigation of pressures prior to the adoption of the

orders now in effect. The requirement of a minimum pressure of not less than two inches water column on two consecutive days was deemed essential by the Commission from the standpoint of safety as well as service. While a reduction in the pressure may not be a source of danger where open flame burners are used danger is to be apprehended in the use of ranges and mantle lamps where the pressure drops below the pressure at which they are adjusted. The Legislature of this State was apparently of the opinion that no danger could result to consumers if the pressure was above one inch, for it expressly provided in the candle power statute that the pressure on the consumers' service shall not be less than one inch nor more than two and one-half inches.

Special efforts were made by the Consolidated Gas Company to assure the maintenance of the pressure requirements of the Commission's order, men being stationed throughout the system's territory from early morning to midnight, telephoning every thirty minutes the pressures read at the twenty-five pressure gauges, while the telometric gauges regularly operated furnished the valve houses instantaneous readings of the pressure at eighteen widely distributed points throughout the territory of the system. The control of the pressure is generally located at the various holders, and, in practice, when a report was received from the inspectors which showed a falling pressure the engineer at the works would increase the pressure in the section affected through the station that controlled the section. There are four systems of distribution — the Standard, the New Amsterdam, the Mutual and the Consolidated, and some of the holders have a line going to each of these systems. A device known as the telometer is located at a particular point in the district, which is maintained with a given holder, and the man in the station presses a button and immediately there is telegraphed back to him the pressure at that point, automatically. These instruments are located in all of the important distributing stations, and that is the way the pressure is ordinarily governed in this manner. If the pressure was low the man in charge of the holder ordinarily raised the

pressure and brought it up to a given point which he was expected to carry in that district. Similar devices and methods are used by other gas companies in New York. A tabulation compiled from data submitted by the companies showing pressure as indicated by charts taken from the companies' permanent recording pressure gauges shows the instances where the Commission's order was violated in any respect. Generally, this tabulation shows that all of the companies in the Consolidated System were complying fully with the terms of the order, with the exception of a few days during the latter part of December, 1917, and the first part of January, 1918, when at certain locations these requirements were not met; that throughout the whole territory supplied by the Brooklyn Union System the pressures were reduced on December 28, 1917, and from then on there were many violations of the order in respect to minimum pressures, which condition existed until on or about January 27, 1918, when pressures were brought back to normal again; that the Bronx Gas and Electric Company conformed fully to the requirements of the order; that the New York and Richmond Gas Company did not conform to the order in certain localities and that pressures at certain of its gauge locations were not very good; that the Brooklyn Borough Gas Company throughout the entire period had been violating the order in certain respects; that the Kings County Lighting Company had frequently during the latter part of December, 1917, and the first part of January, 1918, violated the order in certain respects, and that at at least one gauge on or about February 19, 1918, the minimum pressures were still low, and that the Queens Borough Gas and Electric Company was complying with the order.

The gas companies have nothing to gain and everything to lose by a reduction in the pressure, as it lessens the amount of gas consumed as well as results in unsatisfactory service and complaints from consumers. The greater the pressure of the gas the greater the increase in the amount of gas which can be sent through a pipe. The companies have complete control at their works and holders over the pressure of the gas in the mains and service pipes up to the point where the pipes enter the build-

inga. The maintenance by the companies of the pressure regulations fixed by the Commission has nothing to do with the freezing of the gas. The departure of the companies (with two exceptions above noted) from the gas pressure requirements of the Commission's orders was probably due to an effort on their part to conserve the supply of gas in the face of a great and compelling emergency which threatened for a time to deprive the city and its inhabitants of gas. The Brooklyn Borough Gas Company and the New York and Richmond Gas Company have continuously violated the pressure orders of the Commission, because of the lack of high pressure and transmission equipment, and these companies have been the subject of independent inquiry in that respect. The officials of these companies admit their inability to comply with the Commission's orders, and have assured the Commission that it is their plan to install, in the near future, the necessary equipment to permit them to comply with the pressure requirements of the Commission's orders.

RECOMMENDATIONS.

During the course of the hearing in this proceeding, on March 6, 1918, counsel to the Commission suggested that a conference be held with the corporation counsel and representatives of the various city departments with a view to an early creation of a joint committee composed of representatives of the Commission and city departments and the gas company engineers to formulate statutes and ordinances, or amendments to statutes and ordinances, that might be necessary to prevent or guard against recurrences of the conditions that took place during the past winter and to submit their recommendations in the course of the hearings before the Commission. The assistant corporation counsel attending the hearing assured the Commission that he would confer with the corporation counsel relative to these suggestions. At a subsequent hearing on March 14, 1918, the assistant corporation counsel reported that he had not had an opportunity to take the matter up with the corporation counsel, but that he, personally, considered the suggestion a very good one. No such conference has yet been

held, or indication expressed of the willingness of representatives of the city to cooperate in such a conference for the formulation of legislative changes. The representatives of the Consolidated Gas Company took the position that no such conference or amendatory legislation is needed. No recommendations or suggestions have been made or submitted to the Commission by any of the representatives of the various municipal departments who attended the hearings and whose duties placed them in contact with the conditions which prevailed during the past winter, with the exception of a suggestion by the assistant corporation counsel during the cross-examination of witnesses that gas companies should be required to make periodic inspections of the ranges and appliances sold and rented by them to consumers, and a contention that the gas companies should have had the prevision of the events which occurred and should have made timely preparations to guard against the consequences.

My examination and study of the evidence presented at the hearings prompt the making at this time of the following recommendations for the adoption of preventive measures to minimize such interruptions in service as occurred during the past winter and to enable the gas companies to fulfill their obligations in respect to continuity, adequacy and quality of the service furnished. The carrying out of these recommendations is, of course, dependent in some measure upon whatever restrictions of distribution may be imposed by the Federal authorities in the category of a war measure.

(1) That the gas companies arrange to provide and have available in their possession on their premises, at each of their works in the city of New York, on October 1, 1918, and thereafter to provide, maintain and keep, in its possession, not less than two months' supply of coal for use in the manufacture of gas, as a continuously available reserve supply in connection with and emergency use for the manufacture of gas at their works; and that each company arrange to provide the necessary storage facilities therefor.

(2) That the gas companies arrange to provide and have

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available in their possession on their premises at each of their works in the city of New York on October 1, 1918, and thereafter to provide, maintain and keep in its possession, not less than a two months' supply of oil for use in the manufacture of gas, as a continuously available reserve supply in connection with and emergency use for the manufacture of gas at said works; and that each company arrange to provide the necessary storage facilities therefor.

(3) That the Brooklyn Borough Gas Company and the New York and Richmond Gas Company arrange to install, as promptly as conditions of market supply and materials permit, additional equipment, facilities and devices necessary to enable each of those companies to comply with the pressure regulations prescribed by the orders heretofore issued by this Commission.

(4) That the Brooklyn Union Gas Company and its subsidiaries make repairs and improvements to or changes in their oil storage tanks at the various works of the system so as to permit and make available for use the maximum amount of oil in such tanks.

(5) That the Kings County Lighting Company make repairs and improvements to or changes at its works so as to increase the meter, exhauster and boiler capacity and to insure an adequate and continuous supply of gas of a quantity equal to the demand during the past winter.

(6) That the gas companies should carry on an educational service so as to bring to the attention of every consumer the dangers likely to be apprehended from the use of gas, particularly in the winter time. This could be accomplished by the means heretofore used, only spasmodically, of notations on gas bills, publication in gas papers and sending out postal cards. Particularly, bills issued between November and February should publish cautionary notices of the various forms of danger to be guarded against.

(7) That the gas companies, by explanation and demonstration, acquaint consumers of gas now using open flame burners of the advantages to be gained by the use of mantle lights, and facilitate the change by minimizing the cost.

(8) That all gas companies not now using pulmotors provide a pulmotor on each of their emergency wagons and adopt the practice of responding to calls by the police department and consumers where gas poisoning occurs.

(9) That the Public Service Commissions Law be amended so as clearly and comprehensively to give the Commission jurisdiction of the sale and rental of gas ranges and appliances by companies manufacturing, distributing and selling gas in the city of New York.

(10) That the gas companies should within a reasonable time provide all portions of their service pipes in areaways or exposed places with a protective covering of a type to be approved by the Commission in order to prevent freezing of such service pipes under normal winter conditions.

(11) That the board of aldermen of the city of New York or the bureau of buildings consider the advisability of adopting an ordinance or regulations establishing a schedule of sizes of house pipes and risers and fixing the location of the pipes so as to minimize the freezing of the pipes and the reduction of the pressure therein. If the pipe or house riser is too small the friction caused by the gas flowing through is liable to reduce the pressure and result in the extinguishment of the flames.

(12) That the board of aldermen of the city of New York consider the advisability of adopting an ordinance, somewhat similar to the ordinance now in effect in the city of Newark, State of New Jersey, prohibiting the sale and use of other than approved tubular connections or fabrics intended for any illuminating gas fixtures, stove, heater or lamp, or other gas appliances unless such tube connection, hose or similar device shall have been approved by designated city officials or this Commission, and imposing penalties for violation thereof.

(13) That the United States Government should be requested by the Commission and by the municipal authorities to provide at least one ice-breaker boat, in order to facilitate navigation during the winter in the East, North and Harlem rivers and New York harbor and other waters in this vicinity, in the event

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that a similar situation occur this winter as occurred during the past winter. The government controls all navigable waters, and it is very important that water transportation be kept open not only because of the great danger to life and property such as occurred the past winter, but because of the government's interest in the manufacture of munition products by gas companies, and the further fact that so many war industries are now located on the waterfronts of New York city and vicinity.

(14) The gas engineer of the Commission will report to the Commission from time to time to what extent and by what means the foregoing recommendations have been carried into effect and what, if any, further measures should be initiated.

For the present, at least, no order will be made by the Commission along the foregoing lines. For the most part, they represent matters as to which the cordial co-operation of the companies, the public, the municipal authorities and the Commission will probably prove more effective than would compulsive orders.

In the Matter of the Application of the INTERBOROUGH RAPID TRANSIT COMPANY for Authority to Issue \$16,436,000 Face Amount of 5 Per Cent Bonds under and Secured by Its First and Refunding Mortgage Dated March 20, 1913

Case No. 2182

(Public Service Commission, First District, September 5, 1918)

Modification of previous order asked for by petitioning corporation in regard to issuing bonds.

The Interborough Rapid Transit Company on February 19, 1917, petitioned the Commission for leave to issue certain bonds amounting to \$16,436,000. The petition was subsequently amended on March 16, 1917, and on May 25, 1917, the Commission made an order allowing the petitioner to issue \$11,436,000 face value of said bonds. The company then applied for a rehearing; the application was denied, but the Commission directed that the company be heard with reference to a resettlement of the order. On July 27, 1917, the Commission allowed by order an issue

of \$16,436,000 face value of said bonds. The present application was made by petition of June 24, 1918, asking for a rehearing and stating that it has been impossible to sell the bonds on the basis theretofore fixed by the Commission. This application was granted and such rehearing had. Upon the evidence adduced at the rehearing, the documents presented and the arguments of counsel, *held*, that the Interborough Rapid Transit Company be permitted to issue bonds to the amount of \$28,489,000.

BY THE COMMISSION.—Application having been received from Interborough Rapid Transit Company by its petition verified September 4, 1918, praying a modification of the order of the Commission allowing an issue of bonds of the face value of \$28,489,000 with respect to the description of the notes of said company as stated in paragraph 1 of section 3 of said order, and it appearing to the Commission that the said order of July 23, 1918, should be changed as hereinafter set forth, it is

Ordered by the Public Service Commission for the First District that the order of the Commission made and filed herein and dated July 23, 1918, be and the same hereby is changed to read as follows:

Section 1. Application was made to the Public Service Commission for the First District by Interborough Rapid Transit Company by its petition dated and verified February 19, 1917, under the provisions of the Public Service Commissions Law for the consent of the Commission to the issuance by said company of \$16,436,000 face amount of 5 per cent bonds under and secured by its first and refunding mortgage, dated March 20, 1913, claimed to be necessary for purposes in said petition set forth in addition to the bonds authorized to be issued under said mortgage by order of the Commission made and filed March 20, 1913. A hearing was duly had upon said petition before the Commission, Hon. William Hayward, Travis H. Whitney, Henry W. Hodge and Charles S. Hervey, Commissioners, presiding. Said application was amended by said company as to the amounts of proceeds to be applied to certain purposes as therein stated by a letter dated March 26, 1917. The Commission thereafter made and filed its order May 25, 1917, wherein and whereby the Commis-

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sion allowed an issue by said company of \$11,436,000 face value of said bonds. The said company thereafter by petition, dated and verified July 10, 1917, applied for a rehearing as to the said order of the Commission made and filed herein May 25, 1917. The Commission denied said application for a rehearing but directed that the said company be heard with reference to a resettlement of the said order. The said application was made and heard before the Commission, Hon. Oscar S. Straus, chairman, William Hayward, Travis H. Whitney, Henry W. Hodge and Charles S. Hervey, Commissioners, presiding, and the Commission made and filed its order on July 27, 1917, wherein and whereby the Commission allowed an issue by said company of \$16,436,000 face value of said bonds.

Application having been now made to the Commission by said company by its petition, dated and verified June 24, 1918, praying that a rehearing be granted and stating that it has been impossible to sell its bonds on the basis heretofore fixed by the Commission, and that it will be necessary to secure the moneys required by the issue of short-term notes secured by the applicant's bonds as collateral and that for that purpose as well as providing for increased costs because of war-time prices and a further contingent increase in such costs, the approval by the Commission of the issue and disposal either by sale or pledge of a greater amount of bonds than the amount heretofore authorized will be necessary, and the Commission having granted such application for rehearing and the same having been heard before the Commission, Hon. Oscar S. Straus, chairman, Travis H. Whitney, Charles S. Hervey, Frederick J. H. Kracke and Charles Bulkley Hubbell, Commissioners, presiding, James L. Quackenbush, Esq., appearing for said Interborough Rapid Transit Company, and William P. Burr, corporation counsel, and John F. Collins, assistant corporation counsel, appearing for the city of New York, and after hearing the testimony and examining the documents presented and listening to the arguments of counsel, it being now the opinion of the Commission:

1. That the money to be procured by the issue of said addi-

tional bonds of the Interborough Rapid Transit Company to the amount of not to exceed \$28,489,000 face value, payable at a period of more than twelve months after the date thereof, is necessary to and reasonably required by said company for the acquisition of property or for the construction, completion, extension or improvement of its facilities and particularly for the purposes which are hereinafter stated in this order; and

2. That, except as to the following specified amounts of said bonds authorized to be issued hereunder to procure money to be applied for the purposes following, to wit:

(1) \$2,000,000 or so much thereof as may be necessary to pay the costs of replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of the existing power house, substations, transmission lines or electrical apparatus of the existing Manhattan railroad;

(2) \$820,485 or so much thereof as may be necessary to pay expenses of the sale of notes secured by pledge of bonds hereby authorized and to make up the discount or deficiency in the amount realized upon the sale of said notes at not less than 95½ per cent of par of said notes.

(3) \$10,256,000 or so much thereof as may be necessary to make up the discount by reason of conversion of said notes into bonds at eighty-seven and one-half or sale of said bonds pledged as collateral security at not less than sixty-four; (said purposes are not in whole or in part reasonably chargeable to operating expenses or to income);

Section 2. It is ordered that the Public Service Commission for the First District does hereby authorize the issue by the said Interborough Rapid Transit Company of \$28,489,000 face value of principal of bonds of said company, dated as of January 1, 1913, maturing the 1st day of January, 1966, redeemable at 110 per cent of the face value thereof besides accrued interest on any interest day and bearing interest from the date of the said issue thereof at 5 per cent per annum, payable semi-annually, under and in pursuance of the terms of the mortgage of the said Interborough Rapid Transit Company, dated March 20, 1913;

Section 3. It is ordered that said issue of bonds is authorized upon the conditions following (each of which is hereby specifically made a condition of the approval and issuance of bonds) and not otherwise, to wit:

First. That the said Interborough Rapid Transit Company shall dispose of the said bonds hereby authorized by pledge of the same at not less than 64 per cent of the face value thereof as collateral security for three-year 7 per cent notes of said company dated as of September 1, 1918, redeemable in whole or in part if approved or so directed by the Commission, provided the company has or may secure funds available therefor at the following rates:

103 per cent of face value besides accrued interest, if redeemed at any time during the first year of the life of said notes;

102 per cent of face value besides accrued interest, if redeemed at any time during the second year of the life of said notes;

101 per cent of face value besides accrued interest, if redeemed at any time prior to maturity during the third year of the life of said notes; and the said notes being convertible at any time up to within thirty days of maturity, and thereafter until maturity, provided notice of election to convert and the date thereof be given at least thirty days prior to maturity, into said bonds at 87½ per cent of the par or face value of said bonds, and the proceeds thereof shall be applied only to the following purposes, that is to say:

(1) To pay the actual cost of plant and structure and of equipment of third or additional tracks on the lines of elevated railroad of the Manhattan Railway Company (leased to and operated by the Interborough Rapid Transit Company) under and pursuant to a certificate authorizing the construction, maintenance and operation of such third or additional tracks granted to said company, dated March 19, 1913, as such actual cost may be determined pursuant to such certificate, including modifications, reconstructions, improvements or betterments

of existing structures of the Manhattan Railway Company to facilitate construction or use of said plant and structure under such certificate, other than repairs, maintenance or replacements but including replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of existing structures of the Manhattan Railway Company to facilitate the construction or use of said plant and structure or of said equipment under such certificate. \$11,771,387

(2) To pay the actual cost of plant and structure and of equipment of the extensions of lines of elevated railroads of the Manhattan Railway Company (leased to and operated by the Interborough Rapid Transit Company), under and pursuant to a certificate granted to said company and dated March 19, 1913, authorizing the construction, maintenance and operation of such extensions in conjunction with the existing Manhattan railroad and, through trackage agreements, in conjunction with parts of municipal railroads specified in said certificate, as such actual cost may be determined pursuant to such certificate, including replacements, substitutions or renewals not due to wear and tear from operation and necessitated by the reconstruction of parts of the existing structures of the Manhattan Railway Company for the purposes of physically connecting the same with said extensions. 3,250,131

(3) To pay the cost of the improvements, reconstructions or changes to the power house, substations, transmission lines and electrical apparatus required in connection therewith, now forming part of and supplying the lines of the existing Manhattan railroad (other than repairs, maintenance or replacements), which shall be necessary to provide additional power for the operation of the extension

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(including trackage rights) and the additional tracks authorized by said certificates dated March 19, 1913, but including replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of said existing power house, substations, transmission lines or electrical apparatus to facilitate said purpose:

For such improvements.....	\$391,000
For such replacements, so included, not exceeding	2,000,000

(4) For expenses of the sale of notes to be secured by a pledge of bonds hereby authorized and to make up the discount or deficiency, if any, in the amount realized upon the sale of said notes to net not less than 95½ per cent of par of said notes and to be applied <i>pro rata</i> for the purposes hereinbefore specified	820,485
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\$18,233,000

(5) To make up the discount or deficiency, if any, in the amount realized upon the disposition of the bonds disposed of by said pledge for the purposes referred to in subdivisions 1, 2, 3 and 4 of this paragraph by reason of the conversion of any of the said notes into such bonds at 87½ per cent of the face value of said bonds, or the sale of such bonds pledged as collateral security for said notes at not less than 64 per cent of the face value of said bonds, the proceeds to be applied <i>pro rata</i> for the purposes in said subdivisions stated, not exceeding.....	10,256,000
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\$28,489,000

Second. That all of the bonds hereby authorized shall be amortized prior to their maturity out of the income of the Interborough Rapid Transit Company; provided, however, that such amortiza-

tion may be effected through the operation of the sinking fund provided for by the terms of the aforesaid first and refunding mortgage dated March 20, 1913; and provided furthermore that all of the bonds issued to pay the cost of said replacements under the authority of subdivision (3) of paragraph first of this section shall be thus amortized out of the income of the company and redeemed and cancelled by it in the manner, and at the rate, provided by the said mortgage; that no part of the sum set aside for the amortization of the said bonds issued to pay the cost of said replacements shall be in any way charged against the city of New York or its share or interest in the income or earnings of the railroads under the provisions of the certificates hereinbefore referred to; and that no part of the said replacements or the cost thereof, when amortized, as above provided, shall be credited to the capital account of the said company.

Third. That the said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the bonds hereby authorized to be issued, and on or before the twentieth day of each month the company shall make and file with the secretary of the Commission verified reports to the Commission, stating the sale or sales of said bonds during the previous month, the terms and conditions of sale, the moneys realized therefrom and the use and application of said moneys toward the separate purposes specified in paragraph first above; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Fourth. In case any of the proceeds of the aforementioned bonds hereby authorized for the purposes specified in subdivisions (1) or (2) of paragraph first of section 3 of this order shall be expended by the said company and the amount so expended or any portion thereof shall not be included in, or made a part of, the actual cost as finally determined pursuant to the certificate described in subdivision (1) or subdivision (2), the company shall forthwith after such determination return to the fund derived from the issue of bonds hereby authorized the amount not so

included in any such determination. None of the proceeds of the aforementioned bonds hereby authorized for purposes specified in subdivision (3) of paragraph first of section 3 of this order shall be expended by the said company for any of the purposes specified therein, unless the company shall at least ten days prior to such expenditure, file with the Commission a statement showing the estimated amount of such proposed expenditure and the application thereof, together with such plans or drawings as may be necessary to show the application and proposed use thereof. In case any of the proceeds of the aforementioned bonds hereby authorized for the purposes specified in subdivision (3) of paragraph first of section 3 of this order shall be expended by said company and the Commission or the court on review of an order of the Commission shall determine that the amount so expended, or any portion thereof, has been expended for a purpose not specified in said subdivision (3), the company shall forthwith after such determination return to the fund derived from the issue of bonds hereby authorized the said amount so disallowed.

Fifth. That at the time fixed in the said additional track certificate dated March 19, 1913, for the presentation to the Commission of a statement showing the actual cost of plant and structure and of equipment, the company shall file with the Commission a statement in writing setting forth in detail the cost of all property replaced or abandoned in connection with the improvements paid for out of the proceeds of bonds hereby authorized or authorized for the same purpose by the order of March 20, 1913, made in Case No. 1614.

Sixth. That nothing in this order shall prejudice any right otherwise possessed by the city of New York or the Commission (1) to object to any expenditure of proceeds of the bonds hereby authorized or authorized by the order of March 20, 1913, made in Case No. 1614, included in any statement required to be presented to the Commission pursuant to the additional track certificate or extension certificate dated March 19, 1913, or (2) to investigate further and to question and reject as a claimed credit or charge under the contract between the city of New York and the Inter-

borough Rapid Transit Company, dated March 19, 1913, or the said certificates, any expenditure of proceeds of such bonds, or any part thereof, even though claimed by the company to have been made for purposes specified in subdivision (3) of paragraph first of section 3 of this order or subdivision (7) of paragraph first of section 5 of the order of March 20, 1913, made and filed in Case No. 1614, except that as to the 70,000-kilowatt turbine proposed to be installed at Seventy-fourth street power station referred to in the petition of February 19, 1917, the Commission approves the installation of such unit as being generally necessary, reserving, however, for such further investigation, the details of expenditures for the purpose of installation and the extent to which such expenditures shall be deemed to have been made for purposes in the nature of replacements as aforesaid.

Seventh. That any sums accruing to the company, directly or indirectly, from interest on the deposit, or from the investment, of any proceeds of the bonds hereby authorized shall be considered and accounted for as and as though a part of, but in addition to, the proceeds of the bonds; provided, however, that this condition shall be without prejudice to any right or claim which the said company may otherwise have against the city of New York, or the city of New York may otherwise have against the said company, by reason of any obligation on the part of the said city or the said company under or pursuant to any provision of a certain contract dated March 19, 1913, between the city of New York, acting by the Public Service Commission for the First District, and the Interborough Rapid Transit Company, or under the additional track certificate or extension certificate dated March 19, 1913, hereinbefore referred to.

Eighth. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in derogation or limitation of any right and power otherwise possessed by the Commission to require, in a subsequent proceeding or by future order in this case, the amortization, reclassification of accounts or other suitable provision, as to expenditures deemed to be for purposes in the nature of replacements or chargeable

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under the Public Service Commissions Law to operating expenses or income.

Ninth. That the authority hereby given to issue such bonds hereby authorized shall apply only to bonds issued by the said company on or before the 31st day of December, 1921.

Tenth. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in abrogation, limitation or modification of any right of the city of New York or of the Commission under or pursuant to either of said certificates or the right of the city of New York or the Commission to disallow, object to and contest any items of claimed expenditure or charge by the Interborough Rapid Transit Company under the provisions of either of said certificates or any expenditure of any part of the proceeds of the bonds hereby authorized.

Section 4. It is ordered that this order take effect on the 5th day of September, 1918, and except as provided in paragraph ninth of section 3 of this order limiting the duration of the authority to issue such bonds herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order, the said company shall notify the Commission whether the terms of this order are accepted and will be obeyed.

It is further ordered that the order of the Commission made and filed herein on the 27th day of July, 1917, be and the same hereby is resettled and amended so as to read and provide as above and the said order of July 27, 1917, is hereby abrogated and this order substituted in place thereof.

In the Matter of the Application of INTERBOROUGH RAPID TRANSIT COMPANY for Authority to Issue \$25,483,772 Face Amount of Five Per Cent Bonds under and Secured by its First and Refunding Mortgage, Dated March 20, 1913

Case No. 2218

(Public Service Commission, First District, September 5, 1918)

Order modifying a previous order of the Commission allowing a bond issue of the face value of \$33,098,500, such modification being due to the inability to sell the bonds provided for in such previous order bearing date of July 23, 1918.

On June 11, 1917, the Interborough Rapid Transit Company made and verified its petition to the Commission, asking for the consent of the Commission to the issuance of \$25,483,772 face amount of 5 per cent bonds under and secured by its first and refunding mortgage bearing date of March 20, 1913. Upon a hearing duly had the Commission on July 27, 1917, made an order allowing an issue by said company of \$23,053,000 face value of such bonds. The present application is now made to the Commission by the petitioning company by its petition dated June 24, 1918, asking for a rehearing on the ground that it has been impossible to sell the bonds under the terms of the order of July 27, 1917, and stating that it would be necessary to secure the moneys required through the issue of short-term notes secured by petitioner's bonds as collateral, and that for that purpose, as well as providing for increased cost because of war-time prices, the issue and disposal either by sale or pledge of a greater amount of bonds than those heretofore authorized will be necessary. Under the said petition the Commission granted the rehearing asked for and decided that the previous order should be modified with respect to the issuing of the bonds asked for.

BY THE COMMISSION.—Application having been received from Interborough Rapid Transit Company by its petition verified September 4, 1918, praying a modification of the order of the Commission allowing an issue of bonds of the face value of \$33,098,500 with respect to the description of the notes of said company as stated in paragraph 1 of section 3 of said order, and it appearing to the Commission that the said order of July 23, 1918, should be changed as hereinafter set forth, it is

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Ordered by the Public Service Commission for the First District that the order of the Commission made and filed herein and dated July 23, 1918, be and the same hereby is changed to read as follows:

Section 1. Application was made to the Public Service Commission for the First District by Interborough Rapid Transit Company by its petition dated and verified June 11, 1917, under the provisions of the Public Service Commissions Law for the consent of the Commission to the issuance by said company of \$25,483,772 face amount of 5 per cent bonds under and secured by its first and refunding mortgage dated March 20, 1913, claimed to be necessary for purposes in said petition set forth, in addition to the bonds authorized to be issued under said mortgage by order of the Commission made and filed March 20, 1913, in Case No. 1614. A hearing was duly had upon said petition before the Commission, Hon. Oscar S. Straus, Chairman, William Hayward, Travis H. Whitney, Henry W. Hodge and Charles S. Hervey, Commissioners, presiding, and the Commission thereafter made and filed its order on the 27th day of July, 1917, wherein and whereby the Commission allowed an issue by said company of \$23,053,000 face value of said bonds. Application having been now made to the Commission by the said Interborough Rapid Transit Company by its petition dated and verified June 24, 1918, praying that a rehearing be granted herein and stating that it has been impossible to sell the bonds under the terms of the said order of July 27, 1917, and that it will be necessary to secure the moneys required through the issue of short-term notes secured by petitioner's bonds as collateral and that for that purpose as well as providing for increased cost because of war-time prices the approval by the Commission of the issue and disposal either by sale or pledge of a greater amount of bonds than those heretofore authorized will be necessary; and the Commission having granted such rehearing and the same having been had before the Commission, Hon. Oscar S. Straus, chairman, Travis H. Whitney, Charles S. Hervey, Frederick J. H. Kracke and Charles Bulkley Hubbell, Commissioners, pre-

siding, James L. Quackenbush, Esq., appearing for the Interborough Rapid Transit Company, and William P. Burr, corporation counsel, and John F. Collins, assistant corporation counsel, appearing for the city of New York, and the Commission having considered the testimony and documents presented and heard the argument of counsel, and due consideration having been had, and it being now the opinion of the Commission:

1. That the money to be procured by the issue of additional bonds of the Interborough Rapid Transit Company to the amount not to exceed \$33,098,500 face value payable at a period of more than twelve months after the date thereof is necessary to and reasonably required by said company for the acquisition of property or for the construction, completion, extension or improvement of its facilities, and particularly for the purposes which are hereinafter stated in this order; and

2. That, except as to the following specified amount of said bonds authorized to be issued hereunder to procure money to be applied to the purposes following, to wit:

(1) \$953,235 or so much thereof as may be necessary to pay expenses of the sale of notes secured by pledge of bonds hereby authorized, and to make up the discount, or deficiency in the amount realized upon the sale of said notes to net not less than 95½ per cent of par of said notes.

(2) \$11,915,503 or so much thereof as may be necessary to make up discount by reason of conversion of any of said notes into bonds at eighty-seven and one-half, or sale of said bonds pledged as collateral security for said notes at not less than sixty-four; said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Section 2. It is ordered that the Public Service Commission for the First District does hereby authorize the issue by the said Interborough Rapid Transit Company of \$33,098,500 face value of principal of bonds of said company dated as of January 1, 1913, maturing the 1st day of January, 1966, redeemable at 110 per cent of the face value thereof besides accrued interest on any interest day and bearing interest at 5 per cent per annum

payable semi-annually under and in pursuance of the terms of the mortgage of the said Interborough Rapid Transit Company, dated March 20, 1913.

Section 3. It is ordered that said issue of bonds is authorized upon the conditions following (each of which is hereby specifically made a condition of the approval and the issuance of bonds) and not otherwise, to wit:

First. That the said Interborough Rapid Transit Company shall dispose of the said bonds hereby authorized by pledge of the same at not less than 64 per cent of the face value thereof as collateral security for three-year 7 per cent notes of said company, dated as of September 1, 1918, redeemable in whole or in part if approved or so directed by the Commission, provided the company has, or may secure funds available therefor at the following rates:

103 per cent of the face value besides accrued interest, if redeemed at any time during the first year of the life of said notes. 102 per cent of face value besides accrued interest, if redeemed at any time during the second year of the life of said notes; 101 per cent of face value besides accrued interest, if redeemed at any time prior to maturity during the third year of the life of said notes; and said notes being convertible, at any time up to within thirty days of maturity, and thereafter until maturity, provided notice of election to convert and the date thereof be given at least thirty days prior to maturity, into said bonds at 87½ per cent of the par or face value of said bonds, and the proceeds thereof shall be applied only to the following purposes, that is to say:

1. To pay the cost of equipment of the rapid transit railroad under and pursuant to a certain contract (referred to hereinafter as contract No. 3) dated March 19, 1913, between the city of New York, acting by the Public Service Commission for the First District, and the Interborough Rapid Transit Company, as such cost may be determined pursuant to said contract, including in such equipment any improvement, reconstruction, modification or change authorized by the said contract

dated March 19, 1913, and made pursuant thereto of the power houses, substations or other electrical equipment forming part of the existing equipment of rapid transit railroads now leased to and operated by the Interborough Rapid Transit Company under contracts known and described as contract No. 1 and contract No. 2..... \$20,229,762

2. For expenses of the sale of notes to be secured by a pledge of bonds hereby authorized and to make up the discount or deficiency, if any, in the amount realized upon the sale of said notes to net not less than 95½ per cent of par of said notes and to be applied for the purposes above specified, not exceeding..... 953,235

\$21,182,997

3. To make up the discount or deficiency, if any, in the amount realized upon the disposition of the bonds disposed of by said pledge for the purposes referred to in subdivisions 1 and 2 of this paragraph by reason of the conversion of any of said notes into such bonds at 87½ per cent of the face value of said notes or the sale of said bonds pledged as collateral security for said notes at not less than 64 per cent of the face value of said bonds, the proceeds to be applied *pro rata* for the purposes in said subdivisions stated, not exceeding the sum of 11,915,503

\$33,098,500

Second. That all the bonds hereby authorized shall be amortized, prior to the maturity of the said bonds, out of the income of the company; provided, however, that the said amortization may be effected through the operation of the sinking fund provided for by the aforesaid first and refunding mortgage.

Third. That the said company shall keep separate, true and

accurate accounts, showing the receipt and application in detail of the proceeds of the sale or disposal of the bonds hereby authorized to be issued, and on or before the twentieth day of each month, the company shall make and file with the secretary of the Commission verified reports to the Commission, stating the sale or sales of the said bonds during the preceding month, the terms and conditions of sale, the moneys realized therefrom, and the details of the use and application of said moneys toward the separate purposes specified in paragraph first above; and the said accounts, vouchers and records shall be open to audit, and may be audited, from time to time, by accountants and examiners designated for such purpose by the Commission.

Fourth. In case any of the proceeds of the aforementioned bonds hereby authorized for the purposes specified in subdivision 1 of paragraph first of section 3 of this order shall be expended by the said company and the amounts so expended or any portion thereof shall not be included in or made a part of the said cost of equipment as finally determined pursuant to the said contract No. 3 referred to in subdivision 1, the company shall, forthwith after such determination, return to the fund derived from the issue of bonds hereby authorized the amount not so included in any such determination.

Fifth. That any sums accruing to the company, directly or indirectly, from interest on the deposit, or from the investment, of any proceeds of the bonds hereby authorized shall be considered and accounted for as and as though a part of, but in addition to, the proceeds of the said bonds; provided, however, that this condition shall be without prejudice to any right or claim which the said company may otherwise have against the city of New York, or the city of New York may otherwise have against the said company, by reason of any obligation on the part of the said city or the said company under or pursuant to any provision of the said contract No. 3.

Sixth. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in abrogation, limitation or modification of any right of the city of

New York or of the Commission under or pursuant to the said contract No. 3, or in derogation of any of the rights and powers of the Commission under subdivision (6) of paragraph 18 of article II of contract No. 3, or the right of the city of New York or the Commission to disallow, object to and contest any items of claimed expenditure or charge by the Interborough Rapid Transit Company under the provisions of contract No. 3 or any expenditure of any part of the proceeds of the bonds hereby authorized.

Seventh. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in derogation or limitation of any right and power otherwise possessed by the Commission to require, in a subsequent proceeding or by future order in this case, the amortization, reclassification of accounts or other suitable provision, as to expenditures deemed to be for purposes in the nature of replacements or chargeable under the Public Service Commissions Law to operating expenses or income.

Eighth. That the authority hereby given to issue such bonds shall apply only to bonds issued by said company on or before the 31st day of December, 1921.

Section 4. It is ordered that this order take effect on the 5th day of September, 1918, and, except as provided in paragraph eighth of section 3 of this order limiting the duration of the authority to issue such bonds herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order said company notify the Commission whether this order is accepted and will be obeyed.

It is further ordered that the order of the Commission made and filed herein on the 27th day of July, 1917, be and the same hereby is resettled and amended so as to read and provide as above, and the said order of July 27, 1917, is hereby abrogated and this order substituted in place thereof.

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In the Matter of the Complaint of QUEENS BOROUGH GAS AND
ELECTRIC COMPANY as to the Price of Gas

Case No. 2293

In the Matter of the Complaint of QUEENS BOROUGH GAS AND
ELECTRIC COMPANY as to the Price of Electricity

Case No. 2294

(Public Service Commission, First District, September 5, 1918)

Application of the petitioning company for permission to raise its gas and its electric rates on the ground of what it terms "emergency relief."

Nature of the territory in which the company operates.

The present rates — when established and under what circumstances.

Basis on which the company asks for relief herein and questions to be considered in determining applications such as here made.

From its own figures the company shown not to be confronted by any real emergency and not to be in a position to equitably ask for the relief sought.

The Queens Borough Gas and Electric Company is the only company supplying gas and electricity in the fifth ward of the borough of Queens and in adjacent territory in the county of Nassau. The territory served by it includes Far Rockaway, Edgemere, Arverne and Rockaway Beach, the latter including Hammels, Holland, Seaside and Rockaway Park. In Nassau county the company serves a portion of the town of Hempstead. Most of the population is that of a "summer resort" and the residents during the summer far exceed the winter population and the sales of gas and electricity during the summer are therefore very much larger than during the winter months. The company has filed with the Commission separate complaints relating respectively to the gas and to the electric part of its service, and asks the right to make a substantial increase in the maximum rates now chargeable for gas and electricity respectively during the war period so that the operating revenue may be kept in touch with the increases in operating costs, the financial condition of the company safeguarded and its service kept on a remunerative basis.

The only rates of the petitioning company which have been the subject of legislative action are the rates charged by it for municipal lighting. No statutory maximum is here involved as to either gas or electricity. The present rates were established by the Commission during 1910

and 1911, but in January, 1917, the company signified its willingness to reduce the electric rate from thirteen cents to twelve cents per kilowatt hour, to become effective March 10, 1917. The twelve-cent rate was accepted and is still in force. The contentions of the company outlined.

The present application is not based primarily upon any valuation of the property used in the public service, but rather on the increased cost of producing gas and generating electricity, and at the same time affording the company a net return substantially the same in amount as it earned prior to the war. *Held*, that conditions caused by the war may necessitate rate readjustments in various instances as a sheer matter of conserving and continuing absolutely essential public service of heat, light, transportation, power and communication. When a change in rate is imperative it should be ordered as expeditiously and economically as the facts warrant, without binding either side as to the action which would be taken when conditions are again normal. It was from this point of view that the Commission unanimously approved on June 1, 1918, the memorandum prepared by Commissioner Hubbell, now chairman of the Commission, pointing out the principles and possible procedure to be followed in the hearing and determination of these and substantially similar applications. The questions to be considered in determining applications such as the present one stated at length. As a result of the investigation of the facts in the present application, *held*, that the company has failed to show that it is in a position to equitably ask for the relief sought. A public utility company cannot be allowed to raise its rates as fast and as far as operating costs go up merely because costs have gone up any more than a company voluntarily and automatically decreases its rates as fast and as far as costs go down. Such companies, like other corporations and individuals, must to some extent take the "lean" years with the "fat."

The petitioning company, as shown by its own figures, has made very excessive allowances for depreciation and workmen's compensation and public liability, which have gone into the building up of big reserves. For about ten years past the company has been setting aside more than twenty cents for every one dollar and fifteen cents collected by it for gas sold and has likewise set aside one and one-half cents for every kilowatt hour of electricity. Both of these reserves have been charged to operating expenses and so taken out before the return is computed. In other words, this company, the total property of which is worth little, if any, more than \$2,700,000, has taken approximately \$447,000 from its consumers during the past three years as "reserves" over and above its actual outlays for the purpose indicated. The total "reserves" of the company for these purposes now aggregate \$733,000. These "reserves" are not kept in any separate fund but become a part of the property of the company, in which it claims a right to earn a return. Having thus built up its property and business by excess moneys collected from consumers, rather than moneys contributed by its investors, it is not in a position to allege that a "lean" year or two brings a genuine meritorious

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emergency. No "emergency" exists, as a matter of fact, so far as this company is concerned, entitling it to demand a sharp increase either in its gas or electric rates, because of war-time period and war-time costs. The company should absorb its excessive earnings and reserves of recent years before asking for any such emergency advance. The present applications denied without prejudice to their renewal should a real emergency come into existence as to this company, and without prejudice, of course, to the presentation by the company of complaints seeking an increase in rates on the customary basis. What is now denied is any increase on an "emergency basis," the company having failed to bring its situation within the operation of the general principles and policy declared by this Commission.

Hubbell, Chairman, and Ordway, Commissioner, dissent.

KRAOKE, Commissioner.—I do not believe that a case for the granting of so-called "emergency relief" to this company has been made out, as to either its gas or its electric rates. I do not believe that upon the facts presented, the Commission has the right or reason to do otherwise than dismiss both complaints.

The present petitioner, the Queens Borough Gas and Electric Company, is the only company supplying gas and electricity in the fifth ward of the borough of Queens and in adjacent territory in the county of Nassau. It has filed with this Commission separate complaints, pursuant to section 71 of the Public Service Commissions Law, in which it asks that the Commission grant to it substantial increases in the maximum rates now chargeable for gas and electricity, respectively, during the war period, to the end that the company's operating revenues may be increased proportionately to the increases in operating costs, and thereby the company's financial condition safeguarded and its service kept on a remunerative basis.

The company now charges one dollar and fifteen cents per 1,000 cubic feet for gas and wishes to charge one dollar and forty cents. It now charges twelve cents per kilowatt hour for electricity and wishes to charge fourteen cents. No rate for gas or electricity within the fifth ward of the borough of Queens has ever been fixed by statute, but the Commission on July 23, 1911, prescribed maximum rates of one dollar and fifteen cents for gas and thirteen cents for electricity, and the rates thereby fixed remain the legal *maxima* for the complainant's territory.

The company recognizes, in its basis of application, that it would have no right to apply at this time for an increase in either its gas or its electric rates for any purpose of increasing the return which it has ordinarily earned upon its investment outlay of capital necessarily used in the public service. The theory on which both complaints are stated to have been prepared and filed, and on which the company undertook to present the case to the Commission and asks that it be determined, is plainly that of the granting herein of only such increases as will partly cover the abnormal increases in operating costs due to war-time conditions and yield to the company during the emergency period a net return in no event greater than that earned by the company under the normal conditions preceding the war, at a time when the consumers and the Commission were scrutinizing the company's operations closely to see if its rates as then in force could not be reduced more nearly to the figures obtaining in other portions of the greater city. The company's complaints as to its gas and electric rates would, of course, have to be considered separately in an ordinary rate case, and will have to be separately determined here, although, in deciding whether the company is entitled to "emergency relief" under the general rules and policy declared by the Commission, the company's operating and financial situation may be considered in entirety. The increase in the gas rate is said to be asked to overcome an existent, substantial and increasing deficit in bare operating expenses.

THE TERRITORY SERVED

The Queens Borough Gas and Electric Company furnishes gas and electricity to that outlying part of New York city known as the fifth ward of the borough of Queens and to a contiguous portion of the town of Hempstead in Nassau county. The fifth ward of the borough of Queens comprises Far Rockaway, Edgemere, Arverne and Rockaway Beach. Within the area known as Rockaway Beach are included the districts known as Hammels, Holland, Seaside and Rockaway Park. Most of the territory thus served by this company is near the Atlantic ocean and is

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popular as a "summer resort" and as a place of summer residence. The number of summer residents being far in excess of the winter population, the sales of gas and electricity during the summer months are very much larger than during the winter months, and in order to take care of this summer business during two or three months, the company is obliged to provide a great deal of costly equipment such as generators, mains, etc., which lie substantially idle for two-thirds or three-fourths of the year. Owing to the difficulty of obtaining labor, especially in a time of war, the company of necessity retains in its service most of its employees during the entire twelve months, even though there is no adequate work for many of them to do outside of the two or three summer months. The president of the company testified that while the company serves a very large territory, the consumption per mile of main is small and that the company's overhead charges are exceedingly heavy. The company's summer business requires equipment and standards of service that make the cost of the winter service burdensome, under the present basis of adjustment of the company's rates. Obviously, any failure on the part of the company to seek such an equitable readjustment as would put upon casual summer-time consumers a burden which they now shift in part to the company's year-round patrons, does not constitute a basis for "emergency relief" such as is here sought.

THE CIRCUMSTANCES OF THE PRESENT APPLICATION

Although the company seeks relief on what it deems an "emergency" basis, its procedure is of necessity that prescribed by the Public Service Commissions Law. In filing its two complaints, the company has proceeded pursuant to sections 71 and 72 of the Public Service Commissions Law, which provide that the Commission shall investigate the cause of complaints made by the mayor of a city, the trustee of a village, the town board of a town of not less than a specified number of consumers "or upon complaint of a gas corporation or electrical corporation supplying said gas or electricity, as to the illuminating power, purity, pres-

sure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supply for light, heat or power, or price of electricity sold and delivered in such municipality."

Section 72, in part, provides that: "After a hearing and after such an investigation as shall have been made by the Commission or its officers, agents, ~~examiners~~ or inspectors, the Commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute, to be charged by such corporation or person, for the service to be furnished."

The Commission is not met here with the question of power which confronted the Commission in passing upon the application of The Bronx Gas and Electric Company for permission to increase its rates for gas above a statutory maximum. That petition was denied because the Commission was of the unanimous opinion that the Legislature had specifically withheld from it the power to increase the rate for gas above a maximum rate fixed by a valid, operative statute. Matter of Application of the Bronx Gas and Electric Company, decided April 18, 1918. The Court of Appeals subsequently, on July 12, 1918, held that the Commission was correct in this view. *People ex rel. Municipal Gas Co. v. Public Service Commission*, 224 N. Y. 156; *People ex rel. Bronx Gas & Electric Co. v. Public Service Commission*. — App. Div. —. The Commission has no power to fix a rate higher than the limitation imposed by a legislative maximum unless and until a competent court has enjoined that legislative maximum as unconstitutional, confiscatory, inoperative or otherwise invalid.

The only rates of the Queens Borough Gas and Electric Company which have been the subject of legislative action are the rates charged by it for municipal lighting. No statutory maximum is here involved, as to either gas or electricity.

There is in effect, however, an order adopted by the Commission on June 23, 1911, prescribing the maximum rates for gas and electricity legally chargeable by this company. Such rates were fixed, after investigation by the Commission during 1910

and 1911, as follows: From July 1, 1911, to January 1, 1912, one dollar and twenty cents per 1,000 cubic feet of gas; from January 1, 1912, to July 1, 1912, one dollar and fifteen cents per 1,000 cubic feet of gas; from July 1, 1911, to July 1, 1912, thirteen cents per kilowatt hour of electricity.

In November, 1916, the Commission instituted a proceeding (Case No. 2163) to inquire into the justness and reasonableness of the charge for electricity, and at a hearing held on January 31, 1917, the company signified its willingness to reduce the electric rate from thirteen cents to twelve cents per kilowatt hour, to become effective March 10, 1917. The twelve-cent rate was put into effect on that date and is still in force. Case No. 2163, however, was never formally discontinued, but was adjourned subject to the call of the Commission, as the Commission's engineers and accountants were at that time conducting an examination into the affairs of the company.

THE COMPANY'S POSITION AS TO THE NEED FOR A FORMAL
- REVALUATION OF ALL ITS PROPERTIES FOR RATE PURPOSES
BEFORE UNDERTAKING THE DETERMINATION OF THIS PRO-
CEEDING ON AN EMERGENCY BASIS

It is claimed by the company that the valuation of its property made by the Commission as a basis for its order of June 23, 1911, did not at the time disclose the fair value of the company's property for rate-making purposes, and should not now be taken as a valid or binding basis for fixing the new rate. The company says, moreover, that conditions have greatly changed; that new "tables of lives" of property are now being used, even by the Commission's own engineers; and that the company is unwilling that any use which the Commission may now make of the formal appraisal shall be, or be regarded as, such as would bind or commit the company or the Commission in any way thereto. The company does not base its present application for increased rates primarily upon any valuation of the property used in the public service, but rather on the necessity of obtaining more revenue to meet the increased cost for producing gas and generating elec-

tricity and at the same time afford the company a net return substantially the same in amount as it earned prior to the war.

The following paragraph of each of the complaints states succinctly the company's position as to the prior valuation:

"The company does not wish, however, at the present time to raise the question of the value of the properties devoted to the public service. It does not believe in a time when all the energies of the country should be devoted to carrying on the war, that it is proper for it to expend the large sums necessary to have a revaluation of its properties. Such a revaluation would cost the company in excess of \$50,000. The company, therefore, without waiving its right at some future and more proper time to raise the question of the valuation of its property before the Commission, and to ask for a rate based on a proper valuation, now confines itself to asking that the Commission, in view of the emergency created by the war, enter an order increasing the company's maximum rates, for the period of the war and a reasonable time thereafter, to such extent as may be necessary, that the company may meet the increased cost of producing gas (generating electricity) resulting from the war, and that the net earnings of the company may remain as they were prior to the war."

THE POLICY OF THE COMMISSION AS TO "EMERGENCY RELIEF"
FOR UTILITIES, WITHIN LAWFUL LIMITS, DURING THE WAR

I fully share the view, several times expressed by this Commission, that conditions caused by the war may necessitate rate readjustments in various instances, as a sheer matter of conserving and continuing absolutely essential public service of heat, light, transportation, power and communication. Each application for such a readjustment must, of course, be considered on its own separate and individual merits. When a change in rate is imperative, it is important that the means be available of making the readjustment as expeditiously and economically as the facts warrant, without in any way binding either the companies, the consumers, or the Commission, as to the action which will be taken when conditions are again normal.

It was from this point of view and with this purpose in mind,

I take it, that this Commission unanimously approved, on June 1, 1918, the memorandum prepared by Commissioner Hubbell, now chairman of the Commission, in which he pointed out the general principles and possible procedure to be followed in the hearing and determination of these and substantially similar applications. Recognizing that under normal conditions an application by a public utility corporation for a rate advance would ordinarily involve an appraisal of the company's property, with the delay, expense and diversion of labor and skill inevitably incident thereto, it therefore seemed advisable to consider whether under existing war conditions, such a revaluation might not practically be avoided and, at the same time, justice be done nevertheless to both the corporation and its consumers.

That memorandum stated the Commission's conclusions upon the whole matter of "emergency relief to utilities" as follows:

"*Generally*, however, where (1) no change in relations between classes of consumers or localities is concerned; (2) the increase is asked for to cover only a temporary and emergency period, approximating the duration of the war or less; and (3) the increase is asked for to cover only *the elimination of a current deficit* in operating expenses or *at most* the continued earning of *some part of* the fair and reasonable return ordinarily earned by the particular company in normal times, it is not believed that the Commission need enter upon a regular rate proceeding, with a reappraisal of the corporate property.

"*Except where* substantial reason appears for belief that a public utility company is currently earning more than a reasonable return upon its investment outlay, I am of the opinion that the Commission may well refrain from conducting rate cases in the usual formal fashion, during the period of the war, and may preferably devote itself, within the limits of its delegated powers, to the ascertainment of the relief necessarily to be granted for the war period, to prevent the breaking down of public utility service and lasting detriment to public utility property. *Except where substantial reason for a contrary course appears*, I am of the opinion that the Commission need not, in awarding emergency relief for the limited period, inquire *fully* into the *normal* valua-

tion of the corporate property or try to ascertain *whether the existing rates have ordinarily yielded more or less than a reasonable return upon that value*. Rates in force by legislative fiat or Commission order are *presumptively* reasonable, presumptively neither too high nor too low; and by the same presumption, the *quantum* of return allowed thereby is neither too large nor too small. *In the absence of facts definitely negating this presumption*, the Commission may well act upon it, in affording relief for the period of the war, and reserve the more complete inquiry until normal conditions come again.

"The questions to be considered in determining the merits of applications such as those of the Queens Borough Gas and Electric Company, now before the Commission, will, in my judgment, be primarily these:

"(1) *Is an increase in the rates chargeable by the company necessary to cover operating expenses and necessary fixed charges? Is an increase in rates for the war period necessary to prevent a probable impairment of the service and property and a destruction of the credit of the enterprise? Is an increase in rates needed to overcome inroads made by advanced operating costs or diminished patronage, and to allow to the utility an income no greater than that earned by the utility before the war? In determining what action should be taken in pursuance of the answers to these questions, allowance will of course be made for the fact that public utility companies, no less than other corporations and individuals, must bear their share of the burdens of the war and sustain some loss of income without flinching.*

"(2) What increase in income would probably result from the proposed emergency increase in rates?

"(3) What method shall be followed in making provision for increased rates and revenues? Will the method proposed by the company operate fairly as between localities and between different classes of consumers?

"(4) What conditions and safeguards should be required of the company, precedently to a grant of emergency relief, in order to assure the conserving of the corporate property and its adequate ministration to war-time needs?"

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As stated in the memorandum, the bases so outlined were at that time looked upon as tentative only, and criticism thereof by the company, its consumers (some of whom appeared in person), or representatives of interested civic organizations, was invited. No considerable criticism or adverse comment was developed, and I find no reason for doing otherwise than disposing of the matter along the lines indicated in that memorandum. I am of the opinion, however, that any present suggestion that, under the above-quoted outline of fundamentals, this company should be presently granted an increase in either its gas or its electric rates, proceeds from a failure to analyze fully the facts as to the company's condition or a failure to comprehend the essential *criteria* and purposes of "emergency relief" as above set forth.

DO THE FACTS SHOW THIS COMPANY TO BE WITHIN THE CATEGORY OF THOSE ENTITLED NOW TO "EMERGENCY RELIEF?"

Before any question of the extent or scope of the rate increases to be allowed this or any other company arises and need be discussed, the first question is whether the particular company comes within the category of those entitled to a readjustment in rates on an emergency basis. Each company and each operating and financial situation must be considered on its own merits in this respect. I am not of the opinion that this company has shown itself yet within the category of companies entitled to claim that conditions warrant changes in their rates, on a basis less formal than a regular rate proceeding.

Emergency increases are granted only to enable a company to meet a genuine emergency. A public utility company is not entitled immediately and almost automatically to raise its rates as fast and as far as operating costs go up, merely because costs have gone up, any more than the company voluntarily and automatically decreases its rates as fast and as far as costs go down. The level and trend of rates should follow and generally conform to the level and trend of prices — anything else is disadvantageous to the public, as well as to the company, but a company is not entitled to "emergency relief," to preserve a *quantum* of "before-

the-war" return, if that return has been or is excessive, or if the company's rates have been such as to permit it lately to accumulate surpluses or unwarranted reserves, which may first be drawn upon before its services or finances can be said to be in danger. A company is not entitled, after having charged such rates in the past that its capital account, property or assets have been built up by the taking of excessive sums from customers, to complain and seek emergency relief merely because its rates temporarily fail to continue its past rate of return, including a return on funds collected from consumers and accumulated in some guise of capital, property or reserves. Public utility companies, like other corporations and individuals, must to some extent "take the lean (years) with the fat," and "bear some loss of income in war-time without flinching and without claim of right to the immediate restoration of a full return."

What, then, has been the course of this company, and what the financial results? Has it apparently been earning an excessive return or building up its property and reserves at the expense of its consumers? If its past returns do not appear *moderate* and reasonable, on their face, this Commission has no right or reason to increase the company's rates, on less than full proof and formal revaluation.

The record covers the operating results of 1914-1917 inclusive, and presents estimates for 1918. According to the company's exhibits, the net returns above operating costs were as follows:

	Gas	Electricity	Total
1914.....	\$77,011 26	\$125,132 07	\$202,143 33
1915.....	70,562 10	146,096 99	216,659 09
1916.....	70,061 43	139,185 46	209,246 89
1917.....	36,118 28	93,713 16	129,831 44
1918 (Estimated deficit...	38,813 18	46,746 43	7,933 25

The foregoing are the company's figures, after including as operating cost very excessive allowances for depreciation and workmen's compensation and public liability, which have gone

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into the building up of big reserves. It also includes interest on consumers' deposits, which should properly be regarded as a return on investment and not as an operating cost. Whatever has come out of operating costs, by way of an excessive unwarranted reserve, has operated for the company's benefit, and should be taken into account in scrutinizing the genuineness of the present emergency. The extent of these accumulations I will later discuss, but at this point I may present percentages. As to depreciation and workmen's compensation, the record shows clearly that the company's allowance has been excessive. For depreciation, the charge has been twenty cents per 1,000 cubic feet of gas made, and one and one-half cents per kilowatt hour of electricity generated, less actual costs of repairs. Without trying to fix a conclusive figure, an adequate charge would have been ten cents per 1,000 cubic feet of gas sold and three-quarters of a cent per kilowatt hour of electricity sold. For workmen's compensation, the average annual charge for gas and electricity has been \$21,000, against the average actual outlay of cost of only \$5,237.22. The allowance has amounted to about two and one-half cents per 1,000 cubic feet of gas sold and three-tenths of a cent per kilowatt hour of electricity sold, whereas an adequate allowance would have been one-half cent for gas and five one-hundredths of a cent for electricity, which is sufficient to cover all actual costs, and a liberal allowance for variations and contingencies.

Making these proper readjustments as to the amounts to be set aside for depreciation and workmen's compensation and for interest on consumers' deposits, we have the following revised figures as representing the company's actual earnings, over and above operating costs, available as its return on the operating property:

	Gas	Electricity	Total
1914.....	\$87,346 52	\$130,556 02	\$217,902 54
1915.....	104,803 62	170,676 96	275,480 58
1916.....	104,440 56	176,791 43	281,231 99
1917.....	71,785 48	128,460 61	200,246 09
1918 (estimated)..	5,680 51	87,868 58	93,549 09

For 1918, the foregoing figures, as stated, include the company's *estimate* of the increase in labor and material costs, and show the revenues at *existing* rates. There is reason for believing that the company's estimates of the 1918 increases in cost are excessive, and I shall analyze some of these phases presently. Some obvious errors in computation are, however, presented. In the computation of oil and coal costs, no allowance was made for the quantity on hand when the prices were advanced. For example, the price of gas oil was increased about June twentieth from seven and three-quarter cents to eight and seventy-seven one-hundredths cents per gallon; thereafter the entire estimate of oil to be consumed was computed at the higher price, without regard to the supply on hand purchased at seven and one-quarter cents or less per gallon. Labor costs were increased by 15 per cent, when for the first five months it was only about 6 per cent. It seems, therefore, that while the company's estimates may be realized or perhaps surpassed, they are probably higher than the year 1918 will bring forth.

But, taking the costs for 1918 as presented by the company, with adjustments for workmen's compensation, depreciation and interest on consumers' deposits, the net operating returns, as above stated, show very substantial proportions. Do they appear, on their face, reasonable and moderate, or do they indicate past earnings of excessive proportions? To determine with certainty and finality the adequacy of a gross return requires at least a substantial knowledge of the amount of the investment, and the company has avoided that basis of scrutiny. In the absence of even approximate investment figures, however, no unwarranted general assumption should be made in support of an increase in rates. The company's claim that its pre-war return was presumptively reasonable and should be maintained, impresses me without merit, on the face of the facts herein set forth. The burden of proof that an increase in rates is necessary rests definitely on the company; no increase should be granted on an emergency basis unless it is shown to be both warranted and necessary, and persuasive proof has not been presented.

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The return for gas in 1917 was considerably less than during the preceding years, but still amounted to \$71,785. This was equivalent to a 7 per cent return on a value of \$1,025,000. Is there proof that the company's investment outlay in its gas business exceeds that figure? Not in this record. If, however, the 1917 return may be considered reasonable, then certainly the profits of the preceding years were excessive. If so, should they not be applied now against any deficiency in return in 1918, if there should prove to be such deficiency? The company is entitled to only a fair average annual return and no more. I find no convincing proof that such a fair average will not have been obtained, even with 1918 and 1919 included in the accounting.

If the company has failed to establish the necessity of an increase in gas rates, it has succeeded much less in showing the necessity of an increase in electric rates. In 1917, the return was \$128,460. What reason is there for believing this to be inadequate? It represents 7 per cent upon \$1,835,000. What evidence is there for assuming that this is not considerably more than the investment? But if the 1917 return was adequate, clearly the profits of the preceding years have been inordinate. Ought they not first to be taken into account before an increase in rates is ordered on a plea of present emergency?

RETURN AND FIXED CHARGES

Light may be thrown upon the matter by a comparison of the total net return realized, with the amount of the interest and other fixed charges:

	Return	Fixed charges	Excess of return over fixed charges
1914.....	\$217,902 54	\$131,507 73	\$86,394 81
1915.....	275,480 58	134,761 85	140,718 73
1916.....	281,231 99	135,551 57	145,680 42
1917.....	200,246 09	147,225 09	53,021 00
1918 (Estimated)..	93,549 09	165,000 00	71,450 91
Total	\$1,068,410 29	\$714,046 24	\$354,364 05

This shows that even in 1917 the net return exceeded the fixed charge by \$53,021, while for the entire period the excess was \$354,364. Should not much of this excess be treated now as accumulated against possible deficiencies in "lean" years? The company has no right to absorb the high return of many prosperous years and then come to the Commission for an increase in rates, the moment it experiences a single "lean" year.

Certainly in such a case no increase should be granted without positive proof of necessity. But what is the disclosed necessity? There is nothing to show that the company will be treated unjustly or suffer seriously if a present increase rate is withheld. For 1918, it is true, the return at the present rates will, by the company's estimates, be less than the fixed charges by \$71,450 (return \$93,549 and fixed charges \$165,000). But in the computation of this return, \$71,660 is recognized as validly set aside for depreciation, and there is no evidence that any such amount will be actually needed for renewals of property. The record shows that no important retirements are expected to be made in the near future. The cash allowed in the computation for depreciation can, therefore, be used for the payment of interest under proper safeguards, approved by the Commission, for the emergency. This does not mean that the charges to operating expenses for depreciation reserve should be omitted, but simply that the reserve cash set aside for depreciation may temporarily be used for other necessary payments. If the depreciation reserve be used to meet fixed charges, the company will have available in 1919 enough cash to meet all necessary payments.

Of the fixed charges estimated for 1918, about \$63,241 are incurred on account of floating indebtedness of the company amounting to more than \$1,000,000. Unless this floating indebtedness is represented by capital assets, there would be no justification for providing out of the rates a return which could be used to pay such fixed charges. No claim is made by the petitioner that these fixed charges should be included in the operating expenses. For a company having a plant and business no greater than those of the Queens Borough Gas and Electric Company, the

carrying of so large a floating indebtedness for a continuously long period demands very strong justification. The capitalizability of this indebtedness has never been passed upon, and of course has never been sanctioned by the Commission, since no application has been submitted to this Commission for the authorization of the issuance of evidence of indebtedness for a period of more than twelve months. The indebtednesses have been incurred and renewed for periods of twelve months, so that they have not become subject to the prerequisite review by the Commission as in the case of indebtedness for a period longer than twelve months. Under the circumstances, the record in these proceedings is lacking in evidence concerning the propriety of this floating indebtedness and the fixed charges thereon which are to be met by additional revenues secured through emergency relief.

PAYMENT OF RECENT DIVIDENDS

There is another aspect which should be given consideration. Before 1916 the company never paid dividends on its capital stock. In 1916 it paid \$100,000, and in 1917, \$80,000. The 1916 payment may have been warranted, according to conditions as they appeared then, despite the European War; but in 1917 present conditions were already having their effect. The profits in 1917 may have been high enough to pay the dividends, but the United States was then at war and the advance in prices and costs had begun. Under these circumstances, no doubt the directors foresaw the probable shrinkage in income in 1918, but after paying \$80,000 dividends on stock in 1917, the company almost immediately, when the rising costs actually began to pinch, began to raise the hue and cry of an emergency. If an emergency was so near, why the stock dividend? Was it earned?

As to these dividends on stock, it may be further said that the data available to the Commission indicate that the capital stock of this company represents no investment in property used in the public service. In the 1910 appraisal it appeared that the bonds outstanding and the current indebtedness of the company exceeded the fair value of the property by about \$500,000. Thus even the

bonds do not altogether represent investment in property. Commissioner Maltbie's opinion in 1911, in Case No. 1225, showed that upon the consolidation in 1902, \$2,000,000 of bonds were issued to replace \$400,000 of old bonds. There was, therefore, an overissue, due merely to the consolidation of the properties, amounting to \$1,600,000. In view of this fact, it would seem particularly doubtful whether the 1916-1917 dividend payments on the stock were warranted. Why did the directors in 1917 pay out \$80,000 in dividends to stockholders, in view of the emergency and the company's claim of probability that in 1918 the earnings would not be sufficient to meet fixed charges?

THE COMPANY'S PROBABLE PERCENTAGE OF RETURN

In passing upon these applications for "emergency relief," in direct, summary and somewhat informal way, the Commission has no right or reason to ignore facts known to it, and disclosed by its own records. Upon the facts to which I have referred, this company does not seem *prima facie* entitled to "emergency relief;" its past return does not appear moderate and reasonable on its face.

Owing to the company's insistent attitude the present record does not contain an inquiry as to the value of the company's property for rate purposes, but I believe I am warranted in subjecting the company's past and present net returns to scrutiny in the light of the company's own reports to the Commission since December 31, 1910, showing its additions to, and withdrawals of, property from capital account. The company's own figures of its actual outlay and investment taken in connection with the Commission's complete appraisal of its property as of December 31, 1910, together with a reasonable allowance for depreciation, will give a figure by which the company's net returns may be scrutinized. I do not undertake to say that the resultant figure should be taken with any finality as a finding of value, but it would have an obvious value as a criterion in admeasuring the company's net return upon its unimpaired investment.

Such an analysis leads to the following very striking results, covering the seven years, 1911 to 1917, both inclusive:

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Gas Department

	Investment	Return	Rate per cent
1911	\$871,944 46	\$72,816 89	8.35
1912	988,109 91	33,157 89	3.35
1913	1,214,652 76	101,432 57	8.35
1914	1,394,614 38	87,346 52	6.26
1915	1,435,510 27	104,803 62	7.30
1916	1,449,166 30	104,440 56	7.20
1917	1,481,714 42	71,785 48	4.84

Electric Department

	Investment	Return	Rate per cent
1911	\$794,234 33	\$120,915 57	15.2
1912	838,462 58	134,745 49	16.0
1913	870,493 79	132,085 60	15.1
1914	908,346 58	130,556 02	14.3
1915	945,477 02	170,676 96	18.0
1916	983,509 15	176,791 43	17.9
1917	1,238,713 76	128,460 61	10.3

Both Departments

	Investment	Return	Rate per cent
1911	\$1,666,178 79	\$193,732 46	11.6
1912	1,826,572 49	167,903 38	9.19
1913	2,085,146 55	233,518 17	11.1
1914	2,302,960 96	217,902 54	9.46
1915	2,380,988 19	275,480 58	11.5
1916	2,432,675 45	281,231 99	11.5
1917	2,720,428 18	200,246 09	7.36

In the foregoing statement, the starting point was the Commission's appraisal of 1911, with an adjustment for each year for the additions and withdrawals reported by the company, and a

deduction for depreciation based upon ten cents per 1,000 cubic feet of gas sold and three-fourths of a cent per kilowatt hour electricity sold. The revenue and operating costs were computed on the same basis as in the previous statements of net return, with proper allowance for workmen's compensation and depreciation.

THE COMPANY'S ACCUMULATION AT THE EXPENSE OF ITS CONSUMERS

As bearing upon the genuineness of the company's plea of its emergency and its claim that it must have instantaneous relief from increased costs, I wish to analyze briefly just what the company has been doing and just how it has derived the total quantity of property on which it asserts that it must earn a return, even in war-time.

For about ten years past, the company has been setting aside *twenty cents for every thousand cubic feet of gas manufactured by it — more than twenty cents for every one dollar and fifteen cents collected by it for gas sold*. It has likewise set aside one and one-half cents for every kilowatt hour of electricity. Both of these reserves have been charged to *operating expenses*, and so taken out before the return is computed. Out of the sums so obtained the company has paid for current repairs, and has carried the balance in the account entitled "accrued amortization of capital," nominally or supposedly to be used eventually to meet property retired because of age, obsolescence or inadequacy. This has meant a deduction and reserve, for depreciation alone, of about seventeen cents per 1,000 cubic feet of gas sold, and of one and one-fourth cents per kilowatt hour of electricity sold. In this amortization reserve, which is not represented by any specific fund but is embodied in the company's property, there is now \$664,661.39, which is made up of the following: Electric department, \$343,414; gas department, \$321,247.39.

This amount has been accumulated since 1908 — \$389,000, or over 58 per cent of the entire amount, has been accumulated since January 1, 1914.

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Another item used for a similar purpose, in disregard of the promptings of actual experience, covers workmen's compensation and public liability insurance. The company does not insure with the State insurance fund or with the stock insurance companies. It undertakes to protect itself against its own losses for both kind of liability by carrying its own risks. The company has been reserving each month very substantial sums to meet the actual costs, including workmen's compensation and public liability awards, expenses of the medical and claim departments, and other actual outlays connected with this special risk. The following shows the annual reservations made for 1915, 1916 and 1917, as compared with costs actually incurred and the annual accumulation of the reserve:

	Charges to operating expenses				Accumulation of reserve; charges above cost
	Gas	Electric	Total	Actual costs	
1915	\$9,000	\$9,000	\$18,000	\$2,521 43	\$15,478 57
1916	9,600	14,400	24,000	1,747 16	22,252 84
1917	8,400	12,600	21,000	968 63	20,031 37
Total	\$27,000	\$36,000	\$63,000	\$5,237 22	\$57,762 78
Average	9,000	12,000	21,000	1,745 74	19,254 26

The total allowance for the three years has been \$63,000, while the actual cost has amounted to but \$5,237.22, leaving an accumulation of \$57,762.78 in the reserve account and the record shows that the present reserve now amounts to about \$68,000. The average actual cost per year has been a little over \$1,700 against an average charge to operating expenses of \$21,000. It is no doubt sound business policy for the company to set aside considerable reserve for self-insurance to meet the variations in actual expenditures from year to year, but in a proceeding of this character it is not fair to the present consumers to charge operating expenses with the large amounts which the company desires.

The company's allowance for workmen's compensation and public liability has amounted to about two and one-half cents on

every 1,000 cubic feet of gas sold and to about three-tenths of a cent on every kilowatt hour of electricity, thus resulting in an additional unwarranted charge for gas of two cents per 1,000 cubic feet sold and for electricity of one-quarter of a cent per kilowatt hour sold. A charge of one-half cent per 1,000 cubic feet of gas sold and five one-hundredths of a cent per kilowatt hour sold for electricity, will almost certainly be sufficient for this purpose.

The bearings of the whole matter of course are that, over and above the figures set forth by it as its fair return, a company whose total property is worth little, if any, more than \$2,700,000, has taken approximately \$447,000 from its consumers *during the past three years* as "reserves," over and above its actual outlays for the purpose indicated. The total "reserves" of the company for these purposes now aggregate \$733,000, or between one-fourth and one-third of the total investment value of the electric and gas properties of the company.

The sums thus taken from the consumers of the company, over and above fair reserves for these purposes, are not kept in any separate fund, but are mingled in, and become a part of, the property of the company, on which it claims a right to earn a return. Having thus so largely built up its property and business by excess moneys collected from consumers, rather than moneys contributed by its investors, can it be said that "a lean year" or two brings a genuine, meritorious emergency?

IN CONCLUSION

From the foregoing, I think it is clear that no "emergency," in any real or legitimate sense, confronts this company, entitling it to demand a sharp increase in either its gas or electric rates, because of the war-time period and war-time costs. This company can be in no proper jeopardy, as to its operating expenses, fixed charges, upkeep of property, or the maintenance of its service at normal operating efficiency. Before the company demands "emergency" increase in its present rates, it should "level off," average, and absorb its excessive earnings and

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reserves of recent years. The "fat" of those past years must serve, in the first instance, to carry it through the "lean" years of the uncertain present. Sums unwarrantedly taken from operating revenues and paid out as dividends on over-capitalization or put into the property with only a nominal book-entry as "reserved," should first be utilized in meeting the charges of the emergency period, before demand is made for higher rates and larger revenues. This company has no right or reason to claim that it is confronted with any real extremity or "emergency."

These considerations would impel me to a denial of the pending applications at this time, without prejudice to their renewal, should a real emergency come into existence as to this company, and without prejudice, of course, to the presentation by the company of complaints seeking an increase in rates on the accustomed basis. All that is now denied is an increase on an "emergency basis." The company has failed to bring its situation within the operation of the general principles and policy declared by this Commission.

Whitney and Hervey, Commissioners, concurring; Hubbell, Chairman, and Ordway, Commissioner, dissenting.

**In the Matter of the Application of INTERBOROUGH RAPID
TRANSIT COMPANY for Authority to Issue and Dispose of
\$39,416,000 Face Amount of Three-year 7 Per Cent Notes**

Case No. 2306

(Public Service Commission, First District, September 5, 1918)

Order modifying a previous order of the Commission, made and filed herein and dated July 23, 1918, with respect to the conversion of certain notes and the redemption of the same.

The Interborough Rapid Transit Company on September 4, 1918, filed its application with the Commission asking that the order of the Commission made and filed herein and dated July 23, 1918, be changed and modified in certain particulars, as set forth in the petition, with respect to the conversion of certain notes and the redemption of the same. The

application was granted by the Commission and the Interborough Rapid Transit Company was authorized to issue \$39,416,000 face value of principal of notes of said company as of September 1, 1918, maturing September 1, 1921, bearing interest at 7 per cent, payable semi-annually, secured by 5 per cent bonds of the Interborough Rapid Transit Company issued under its first and refunding mortgage, dated March 20, 1913, maturing January 1, 1966, ordered by this Commission to be issued under its orders made and filed July 23, 1918, the permission granted being for the purposes and under the restrictions specifically set forth in the order herein.

BY THE COMMISSION.—Application having been received from the Interborough Rapid Transit Company by its petition verified September 4, 1918, praying that the order of the Commission made and filed herein and dated July 23, 1918, be changed and modified in certain particulars in said petition set forth, with respect to the conversion of said notes and the redemption of the same, and it appearing to the Commission that said order should be changed as hereinafter set forth, it is

Ordered, That the order of the Commission made and filed herein, and dated July 23, 1918, be and same hereby is changed to read as follows:

Section 1. Application having been made to the Public Service Commission for the First District by Interborough Rapid Transit Company by its petition dated and verified June 29, 1918, as amended July 19, 1918, for the consent of the Commission to the issuance by said company of \$39,416,000 face value of 7 per cent notes, dated as of September 1, 1918, maturing September 1, 1921, convertible at any time up to within thirty days of maturity, and thereafter until maturity, provided notice of election to convert and the date thereof be given at least thirty days prior to maturity, into 5 per cent bonds of said company at 87½ per cent of the face value of said bonds, the issue of which is claimed to be necessary for purposes in said petition set forth; and a hearing having been duly had upon said petition before the Commission, Hon. Oscar S. Straus, chairman, Travis H. Whitney, Charles S. Hervey, Frederick J. H. Kracke and Charles Bulkley Hubbell, Commissioners, presiding; James L. Quackenbush, Esq., appearing for the Interborough Rapid Transit Com-

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pany, and William P. Burr, corporation counsel, and John F. Collins, assistant corporation counsel, appearing for the city of New York, and the Commission having heard the testimony and documents presented together with the argument of counsel, and due consideration of the same having been had, and it being now the opinion of the Commission:

1. That the money to be procured by the issue of notes of the Interborough Rapid Transit Company to the amount of \$39,416,000 face value payable at a period of more than twelve months after the date thereof is necessary to and reasonably required by said company for the acquisition of property or for the construction, completion, extension or improvement of its facilities, and particularly the purposes which are hereinafter stated in this order; and

2. That, except as to the following specified amounts of said notes authorized to be issued hereunder to procure money to be applied to the purposes following, to wit:

(1) \$2,000,000 or so much thereof as may be necessary to pay the cost of replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of the existing power house, substations, transmission lines or electrical apparatus of the existing Manhattan Railroad;

(2) \$1,773,720 or so much thereof as may be necessary to pay expenses of sale of notes hereby authorized and to make up discount; said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Section 2. It is ordered that the Public Service Commission for the First District does hereby authorize the issue by said Interborough Rapid Transit Company of \$39,416,000 face value of principal of notes of said company dated as of September 1, 1918, maturing September 1, 1921, bearing interest at 7 per cent per annum, payable semi-annually, secured by 5 per cent bonds of the Interborough Rapid Transit Company issued under its first and refunding mortgage dated March 20, 1913, maturing January 1, 1966, authorized to be issued by this Commission by its certain orders made and filed July 23, 1918, in Cases Nos.

2182 and 2218, deposited as collateral security for the payment of the said notes, and the said notes being redeemable, in whole or in part, if approved or so directed by the Commission, provided the company has or may secure funds available therefor at the following rates:

One hundred and three per cent of face value besides accrued interest, if redeemed at any time during the first year of the life of said notes;

One hundred and two per cent of face value besides accrued interest, if redeemed at any time during the second year of the life of said notes;

One hundred and one per cent of face value besides accrued interest, if redeemed at any time prior to maturity during the third year of the life of said notes; and the said notes being convertible, at any time up to within thirty days of maturity, and thereafter until maturity, provided notice of election to convert and the date thereof be given at least thirty days prior to maturity, into said bonds at $87\frac{1}{2}$ per cent of the par or face value of said bonds.

Section 3. It is ordered that said issue of notes is authorized upon the conditions following (each of which is hereby specifically made a condition of the approval and issue of notes) but not otherwise, to wit:

First. That the said Interborough Rapid Transit Company shall sell the said notes hereby authorized so as to net the said company not less than $95\frac{1}{2}$ per cent of the face value of the principal thereof besides interest accrued thereon, and that the proceeds thereof shall be deemed to be proceeds of the said bonds deposited as collateral security for the payment of said notes and that the said proceeds of said notes shall be used when and as ready and be applied only to the following purposes, that is to say:

(1) To pay the cost of equipment of the rapid transit railroad under and pursuant to a certain contract (referred to hereinafter as contract No. 3) dated March 19, 1913, between the city of New York, acting by the Public Service Commission for

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the First District, and the Interborough Rapid Transit Company as such cost may be determined pursuant to said contract including in such equipment any improvement, reconstruction, modification or change authorized by said contract, dated March 19, 1913, and made pursuant thereto of the power houses, substations or other electrical equipment forming part of the existing equipment of rapid transit railroads now leased to and operated by the Interborough Rapid Transit Company under contracts known and described as contract No. 1 and contract No. 2.....

\$20,229,762

(2) To pay the actual cost of plant and structure and of equipment of third or additional tracks upon the lines of elevated railroad of the Manhattan Railroad Company (leased to and operated by the Interborough Rapid Transit Company), under and pursuant to a certificate authorizing the construction, maintenance and operation of such third or additional tracks granted to said company, dated March 19, 1913, as such actual cost may be determined pursuant to such certificate, including modifications, reconstructions, improvements or betterments of existing structures of the Manhattan Railway Company to facilitate construction or use of said plant and structure under such certificate other than repairs, maintenance or replacements but including replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of existing structures of the Manhattan Railway Company to facilitate the construction or use of said plant and structure or of said equipment under such certificate.....

11,771,387

(3) To pay the actual cost of plant and structure and of equipment of the extensions of lines of

elevated railroads of the Manhattan Railway Company (leased to and operated by the Interborough Rapid Transit Company) under and pursuant to a certificate granted to said company and dated March 19, 1913, authorizing the construction, maintenance and operation of such extensions in conjunction with the existing Manhattan Railroad and through trackage agreements, in conjunction with parts of municipal railroads specified in said certificate, as such actual cost may be determined pursuant to such certificate, including replacements, substitutions or renewals not due to wear and tear from operation and necessitated by the reconstruction of parts of the existing structures of the Manhattan Railway Company for the purpose of physically connecting the same with said extensions \$3,250,131

(4) To pay the cost of the improvements, reconstructions or changes to the power house, substations, transmission lines and electrical apparatus required in connection therewith now forming part of and supplying the lines of the existing Manhattan Railroad (other than repairs, maintenance or replacements), which shall be necessary to provide additional power for the operation of the extensions (including trackage rights) and the additional tracks authorized by said certificates, dated March 19, 1913, but including replacements not due to wear and tear from operation and necessitated by the modification or reconstruction of said existing power house, substations, transmission lines or electrical apparatus to facilitate said purpose:

For such improvements.....	391,000
For such replacements so included, not exceeding	2,000,000

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(5) For the expenses of the sale of the notes hereby authorized and to make up the discount or deficiency, if any, in the amount realized upon the sale to net not less than 95½ per cent of par of the notes sold for the purposes specified in subdivisions (1), (2), (3) and (4) of this paragraph of this section, to be applied *pro rata* for the purposes therein stated, not exceeding the sum of..... \$1,773,720

\$39,416,000

Second. That all of the notes hereby authorized shall be amortized prior to the maturity of the said bonds securing the same out of the income of the Interborough Rapid Transit Company; provided, however, that such amortization may be effected through the operation of the sinking fund provided for by the terms of the aforesaid first and refunding mortgage, dated March 20, 1913: and provided, furthermore, that all of the notes or bonds of which the proceeds are to be used to pay the cost of said replacements under authority of subdivision (3) of paragraph first of this section shall be thus amortized out of the income of the company and redeemed and canceled by it in the manner and at the rate provided by the said mortgage; that no part of the sum set aside for the amortization of the said notes or bonds issued to pay the cost of said replacements shall be in any way charged against the city of New York or its share or interest in the income or earnings of the railroads under the provisions of the certificates hereinbefore referred to; and that no part of the said replacements or the cost thereof, when amortized as above provided, shall be credited to the capital account of the said company.

Third. That the said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the notes hereby authorized to be issued and on or before the twentieth day of each month the company shall make and file with the secretary of the Commission verified reports to the Commission stating the sale or sales of the

said notes during the previous month, the terms and conditions of sale, the moneys realized therefrom and the use and application of said moneys toward the separate purposes specified in paragraph first above; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Fourth. In case any of the proceeds of the aforementioned notes hereby authorized for the purposes specified in subdivision (1) of paragraph first of section 3 of this order, shall be expended by the said company, and the amounts so expended or any portion thereof shall not be included in or made part of the cost of equipment as finally determined pursuant to the said contract No. 3, referred to in subdivision (1), the company shall forthwith, after such determination, return to the fund derived from the issue of notes hereby authorized, the amount not so included in any such determination.

Fifth. In case any of the proceeds of the aforementioned notes hereby authorized for the purposes specified in subdivision (2) or (3) of paragraph first of section 3 of this order shall be expended by the said company, and the amount so expended or any portion thereof shall not be included in or made a part of the actual cost as finally determined pursuant to the certificate described in subdivision (2) or subdivision (3), the company shall forthwith, after such determination, return to the fund derived from the issues of notes hereby authorized the amount not so included in any such determination. None of the proceeds of the aforementioned notes hereby authorized for purposes specified in subdivision (4) of paragraph first of section 3 of this order shall be expended by the said company for any of the purposes specified therein, unless the company shall at least ten days prior to such expenditure, file with the Commission a statement showing the estimated amount of such proposed expenditure and the application thereof, together with such plans or drawings as may be necessary to show the application and proposed use thereof. In case any of the proceeds of the aforementioned notes hereby authorized for the purposes specified in subdivision (4) of paragraph first of

section 3 of this order, shall be expended by said company and the Commission or the court, on review of an order of the Commission, shall determine that the amount so expended or any portion thereof has been expended for a purpose not specified in said subdivision (4), the company shall forthwith after such determination return to the fund derived from the issue of notes hereby authorized the said amount so disallowed.

Sixth. That at the time fixed in the said additional track certificate, dated March 19, 1913, for the presentation to the Commission of a statement showing the actual cost of plant and structure and of equipment, the company shall file with the Commission a statement in writing setting forth in detail the cost of all property replaced or abandoned in connection with the improvements paid for out of the proceeds of notes hereby authorized or bonds authorized for the same purpose by the order of March 20, 1913, made in Case No. 1614.

Seventh. That nothing in this order shall prejudice any right otherwise possessed by the city of New York or the Commission (1) to object to any expenditure of proceeds of the notes hereby authorized or bonds authorized by the order of March 20, 1913, made in Case No. 1614, included in any statement required to be presented to the Commission pursuant to the additional track certificate or extension certificates, dated March 19, 1913, or (2) to investigate further and to question and reject as a claimed credit or charge under the contract between the city of New York and the Interborough Rapid Transit Company, dated March 19, 1913, or the said certificates, any expenditure of proceeds of such notes, or any part thereof, even though claimed by the company to have been made for purposes specified in subdivision (4) of paragraph first of section 3 of this order or subdivision (7) of paragraph first of section 5 of the order of March 20, 1913, made and filed in Case No. 1614, except that as to the 70,000-kilowatt turbine proposed to be installed at Seventy-fourth Street power station, referred to in the petition of February 19, 1917, the Commission approves the installation of such unit as being generally necessary, reserving, however, for such further

investigation, the details of expenditures for the purpose of installation and the extent to which such expenditures shall be deemed to have been made for purposes in the nature of replacements as aforesaid.

Eighth. That any sums accruing to the company, directly or indirectly, from interest on the deposit, or from the investment, of any proceeds of the notes hereby authorized, shall be considered and accounted for as and as though a part of, but in addition to, the proceeds of the notes; provided, however, that this condition shall be without prejudice to any right or claim which the said company may otherwise have against the city of New York, or the city of New York may otherwise have against the said company, by reason of any obligation on the part of the said city or the said company under or pursuant to any provision of a certain contract, dated March 19, 1913, between the city of New York, acting by the Public Service Commission for the First District, and the Interborough Rapid Transit Company, or under the additional track certificate or extension certificate, dated March 19, 1913, hereinbefore referred to.

Ninth. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in derogation or limitation of any right and power otherwise possessed by the Commission to require, in a subsequent proceeding or by future order in this case, the amortization, reclassification of accounts or other suitable provision, as to expenditures deemed to be for purposes in the nature of replacements or chargeable under the Public Service Commissions Law to operating expenses or income.

Tenth. That the authority hereby given to issue such notes hereby authorized shall apply only to notes issued by the said company on or before the 31st day of December, 1918.

Eleventh. That neither the action of the Commission nor any provision of this order shall be deemed to be in any respect in abrogation, limitation or modification of any right of the city of New York or of the Commission under or pursuant to the said contract No. 3 or either of the said certificates or in derogation of any of

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the rights or powers of the Commission under subdivision (6) of paragraph 18 of article II of contract No. 3, or the right of the city of New York or the Commission to disallow, object to and contest any items of claimed expenditure or charge by the Interborough Rapid Transit Company under the provisions of contract No. 3 or either of said certificates or any expenditure of any part of the proceeds of the bonds hereby authorized.

Section 4. It is ordered that this order take effect on the 5th day of September, 1918, and except as provided in paragraph tenth of section 3 of this order limiting the duration of the authority to issue such notes herein granted, in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order, the said company shall notify the Commission whether the terms of this order are accepted and will be obeyed.

In the Matter of the Publication of and the Filing with the Public Service Commission for the First District of SCHEDULES SHOWING ALL RATES AND CHARGES Made, Established or Enforced, or to be Charged or Enforced, All Forms of Contract or Agreement, and All Rules and Regulations, Relating to Rates, Charges or Service, Used or to be Used, and all General Privileges and Facilities Granted or Allowed, by Gas Corporations and the Time within which Changes Proposed to be Made in Such Schedules Shall go into Effect

Case No. 2330

(Public Service Commission, First District, September 17, 1918)

Rates and charges made and forms of contract and all rules and regulations relating thereto and all general privileges and facilities granted or allowed by gas corporations within the first district—schedule of times within which changes proposed to be made in such rates and charges shall become effective.

The Public Service Commission for the First District, in order to clarify the existing conditions as to rates and other matters of detail, ordered that every gas corporation subject to its jurisdiction, within

fifteen days after service upon it of a certified copy of the order herein, file with the Commission a printed schedule showing all rates and charges heretofore made and established, and now being charged or enforced or hereafter to be charged or enforced, for gas supplied by it to consumers within any territory served by it, together with any and all forms of contract or agreement, and any and all rules and regulations relating thereto used or to be used, and all general privileges and facilities granted or allowed by said corporation to any of its consumers, and that every such company, from and after such filing, keep copies of the same posted and open for public inspection. The general form of such schedule and the details to be shown on the title page thereof, the form of the standard sheets of such schedule, what shall be shown in the table of contents and in the preliminary statement and all other matters of detail in relation to said schedules stated in full in the order herein.

By THE COMMISSION.—It is hereby ordered:

I. That every gas corporation subject to the jurisdiction of the Public Service Commission for the First District of the State of New York shall, within fifteen days after the service upon it of a certified copy of this order, file with this Commission a printed schedule showing all rates and charges heretofore made and established, and now being charged or enforced, or hereafter to be charged or enforced, for gas supplied by it to consumers within any territory served by it, together with any and all forms of contract or agreement, and any and all rules and regulations, relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed, by it, to any of its consumers, and such company shall, from and after the date of such filing, keep posted and open for public inspection, as hereinafter provided, copies thereof.

II. From and after the date of such filing, unless the Commission, for good cause shown and upon such conditions as it may prescribe, otherwise orders, no change shall be made by any such gas corporation in any rate or charge, form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published in compliance with the terms and provisions of this order, except after thirty days' notice to the Commission and after publication, in the manner hereinafter

provided, for thirty days, and except after application to the Commission where required by law.

GENERAL FORM OF SCHEDULE

III. All such schedules and all revisions thereof shall be printed on paper of good quality in loose sheet form, eight and one-half by eleven inches in size, so fastened together that any sheet may be removed, a revised sheet substituted or additional sheets inserted.

CONTENTS OF SCHEDULE

IV. Each schedule shall consist of a double sheet used as a cover and title page, and shall contain, in the order named:

- (a) A table of contents;
- (b) Any necessary preliminary statement;
- (c) A statement of each rate charged and, where different rates are charged in different districts within the territory supplied, a statement defining the boundaries of each such district and setting forth the rate or rates charged within each thereof.

TITLE PAGE

V. The title page of every schedule shall show in full:

- (a) The name and address of the corporation.
- (b) The serial number of the schedule with proper prefix.
- (c) The area to which the schedule applies.
- (d) The date of issue, the date of posting, and the date upon which it became or is proposed to become effective.
- (e) The name, title and address of officer by whom issued.
- (f) In the upper left-hand corner the words "Any amendment to this Schedule will be made by issuing a new or revised individual sheet or sheets, filed to become effective as noted thereon."

STANDARD SHEETS

VI. The standard sheet shall be eight and one-half inches wide by eleven inches long. When convenient, printed matter may be placed upon both sides of such sheets. The "type-page" shall

be not larger than six and seven-eighths inches by eight and three-fourths inches and shall be so placed upon each sheet as to leave not less than the following margins: one and one-half inches at the top; one-half inch at the right-hand side; one and one-eighth inches at the left-hand side, and one inch at the bottom. Perforations or holes for binding or filing shall be in the left margin of each sheet.

The margin at the top shall show:

(a) On the left-hand side, the name and the post-office address of the corporation filing the schedule or supplement.

(b) On the right-hand side, the number and prefix of the schedule (*e. g.*, Con. G. Co. No. 1), with a designation showing whether it is an original or a revised sheet. If a revised sheet, it shall give notice of cancellation, state the sheet or sheets which it cancels, and the date upon which such cancelled sheet or sheets became effective (*e. g.*, Con. G. Co. No. 1, Revised Sheet No. 1; Cancelling Original Sheet No. 1, effective Jan. —, 19—). Subsequent issues shall be consecutively designated second revised, third revised, etc.

The margin at the bottom shall show:

(a) On the left-hand side, the date of issue.

(b) On the right-hand side, the date upon which it became or is to become effective.

(c) If a revised sheet, a brief statement (in bold-faced type) of the changes, and the date upon which it is to become effective.

(d) If issued under the special permission, or an order, of the Commission, the date and number of such special permission or order.

(e) The name and post-office address of the officer or agent of the gas corporation who is responsible for the filing of the schedule sheet.

TABLE OF CONTENTS

VII. The table of contents shall contain a full and complete statement of the contents of the entire schedule, arranged in the order of the sheets. Under general headings referring to sheet numbers, there shall be shown in a separate column the date

when each revised sheet became effective. A revised table of contents shall be published and filed simultaneously with the publication and filing of each revised sheet.

PRELIMINARY STATEMENT

VIII. The preliminary statement shall describe:

- (a) The territory served by the corporation.
- (b) How the corporation's services can be obtained, in detail, stating the kind of application or contract which is required to be signed, the deposit, if any, required, and what must be done by the applicant.
- (c) The type of service to which the rates apply, indicating boundaries of different types.

RATE SHEETS

IX. Rate sheets shall contain the following;

- (a) Designation of rate. A designation of each rate sheet by a letter and title of the rate (*e. g.*, "Rate A—General Service").
- (b) Availability of service. A statement as to the availability of the service, describing the class of customers to whom the rate is applicable and any limitation of that class.
- (c) Rate. The rate and charge for the furnishing of gas or any apparatus in connection with the use thereof or any privilege, giving the basis or unit rate or rates, or series of unit rates used in computing the total charge to the customer, and spelling technical terms in full without abbreviations.
- (d) Discounts. If any discounts, or reductions in unit rates, are allowed, or any additions are made, a full explanation of the conditions under which the same are allowed or are made.
- (e) Determination of demand. If the rate used be a demand rate, the exact method of determining the demand.
- (f) Minimum charge. The amount of minimum charge to be guaranteed, if any be required, and the basis of such charge.
- (g) Standard riders. All riders which may be applied to the particular rate shall be referred to by the number given to the rider upon the sheet or sheets containing standard riders.

(h) **Term.** The term of the contract relative to its duration, term or cancellation.

(i) **Terms and conditions.** Any terms and conditions applying especially to the particular rate, and a reference to the sheet number upon which may be found the standard "Terms and Conditions of Service" applicable to all contracts.

(j) The date or dates on which any rate or rates at the time being charged for gas went into effect; and

(k) The authority by or pursuant to which such rate or rates were prescribed or put in force.

(l) If a revised sheet, a brief statement (in bold-faced type, in the margin at the bottom) of the changes.

TERMS AND CONDITIONS

X. On this sheet or sheets shall be set forth an exact copy of all of the terms and conditions and rules and regulations which may be contained in any form of contract or schedule rates which in any way affect the furnishing in the first instance, or the continuance or discontinuance of any service.

STANDARD RIDERS

XI. On this sheet shall be set forth an exact copy of every standard rider containing any terms and conditions and any rules or regulations, applicable to any rate or service described on the rate sheets, each rider under separate number, so that each such rider may be readily identified and referred to in the rate sheets.

Any corporation may in its discretion insert in any contract a standard clause relating to any minor service condition, provided such standard clause shall first have been submitted by the said corporation to, and approved by, the Commission.

FORMS OF CONTRACT

XII. Where any form of contract is printed, mimeographed or manifolded, one copy thereof shall be filed with the Commission and one copy attached to each copy of the schedule kept open for public inspection as hereinafter provided.

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CANCELLATION OR REVISION OF SCHEDULE

XIII. (a) A schedule or rate sheet may be cancelled only by a new schedule or revised rate sheet, and the superseded schedule or rate sheet shall be replaced by the new schedule or rate sheet.

(b) A revised sheet shall be placed in the schedule (which shall be properly bound for that purpose) immediately following the sheet which it is to supersede; on the date when such revised sheet becomes effective the sheet which it supersedes shall be removed from the schedule.

(c) If a schedule be cancelled by the issuance of a new schedule, notice of cancellation must be printed in the new schedule, making specific reference to the number of the schedule cancelled.

SINGLE SCHEDULE

XIV. Only one schedule, including the revised sheets, for each corporation may be in effect at any time.

NOTICE OF ISSUE

XV. (a) The title page of every schedule and each sheet thereof must show full thirty (30) days' notice, or bear a plain notation of the number and date of the special permission or order of the Commission, under which it is to become effective on less than the regular notice; *e. g.*, "Issued on.....days' notice to public and Commission, under special permission (or order) of the Public Service Commission for the First District, State of New York, No.....of date....."

(b) Changes of schedule may be permitted by the Commission on less than the regular thirty days' notice, but such permission will be granted only in cases where actual emergency or substantial merit be shown, or where the change reduces a rate. Application, duly verified, for permission to put in force a schedule or revised or additional sheet or sheets on less than thirty days' notice, shall be addressed to the Public Service Commission for the First District, State of New York, New York city, N. Y., in the form hereinafter prescribed, and must be over the signature

of the officer charged with the preparation, posting and filing of schedules, and must specify his title. Action will be taken only upon receipt of the verified application.

WITHDRAWAL OF CHANGE

XVI. After notice of a proposed change in the schedule has been filed and published, the new schedule or revised sheet must be allowed to go into effect and cannot be withdrawn, cancelled, superseded or amended, except upon notice filed and published for at least thirty days after the date upon which the schedule became effective, or upon shorter notice if allowed by the Commission.

COPIES TO BE AVAILABLE FOR DISTRIBUTION

XVII. Printed copies of all schedules in force or to be put in force shall, except as herein otherwise provided, be kept posted for at least thirty days before being put into effect or for such shorter time as may be authorized by the Commission, in two public and conspicuous places in every office or place where applications for service are received, in such manner as to be readily accessible to and conveniently inspected by the public. Every consumer, or applicant for service, shall be entitled to a printed copy of any schedule in force upon payment of a reasonable price therefor; every such copy shall bear a stamp or endorsement stating that such schedule may be changed in accordance with law or the orders of the Public Service Commission for the First District.

FILING OF SCHEDULE

XVIII. (a) Every schedule and every revised or additional sheet shall be filed with the Commission by the proper officer of the corporation.

(b) Every schedule and every revised or additional sheet filed with the Commission shall be accompanied by a letter of transmittal in duplicate. The original will be retained by the Commission and the duplicate will be stamped and returned to the filing corporation as its receipt for the schedule or sheets covered thereby.

(c) All schedules filed with the Commission must bear consecutive serial numbers prefixed by an abbreviation of the corporation's name commencing with No. 1 for each corporation (*e. g.*, Con. G. Co.—1 N. Y.—No. 1).

(d) Schedules and revised or additional sheets sent for filing must be addressed to the Secretary of the Public Service Commission for the First District, at the principal office address of the Commission.

(e) Any schedule or sheet which is not numbered consecutively with the last number filed must be accompanied by a memorandum explaining the omission of the missing number or numbers.

(f) If a schedule or revised or additional sheet be rejected by the Commission as unlawful, or as not in accordance with the terms of this Order, such schedule or sheet shall not thereafter be referred to as cancelled, amended or otherwise, except to note on publication issued in lieu of such rejected schedule or sheet "In lieu of....., rejected by Commission," nor shall the number which it bears be again used.

(g) No schedule or sheet will be accepted for filing unless it be delivered to the Commission, free from all charges or claims for postage, sufficiently in advance of the date upon which it is stated to become effective. No consideration will be given to or for the time during which a schedule or sheet may be held by the post-office authorities because of insufficient postage. Schedules or sheets filed and issued without proper notice to the Commission will be returned to the sender. Full notice must be given of any reissue thereof, and correction of the neglect or omission cannot be made which takes into account any time elapsing between the date upon which such schedule or sheet was received and the date of attempted correction.

(h) No consideration will be given to telegraphic notices in computing the thirty days required.

(i) If publication be not according to these regulations this may be considered by the Commission sufficient cause for rejection of the schedule or sheet when tendered for filing.

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FORM OF LETTER OF TRANSMITTAL AND OF APPLICATION

XIX. The following forms on paper eight and one-half by eleven inches in size are prescribed for use:

(a) Form of Letter of Transmittal.

.....

(Name of corporation)

(Date).....

Advice No.

To the Public Service Commission for the

First District of the State of New York,

New York, N. Y.

Dear Sirs—The accompanying schedule or sheet.....
sent to you for filing in compliance with Order in Case No. 2330
of the Public Service Commission for the First District, issued
by..... bearing
.....Schedule of.....Co.
No.....; or

Sheet No..... toCo., No.....

Revising Sheet No..... (Cancelling original or revised

Sheet No.....) Effective....., 19....

.....

(Name of corporation)

.....

(Place and date)

(b) Form of Application.

To the Public Service Commission for the

First District of the State of New York,

New York, N. Y.

Dear Sirs—The Co.,
by

(Name of officer)

its....., hereby applies under
(Title of officer)

Order in Case No. 2330 of the Public Service Commission for
the First District for an order granting permission to put in effect
.....days after publication at offices and filing with
the Commission the following schedule or sheet:

.....

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The proposed change is intended to be published in schedule of.....Co. No., Sheet No....., and will revise Sheet No....., cancelling original (or) revised Sheet No....., or Schedule No.....

This application is based upon the following special circumstances and conditions:

.....
 (Name of corporation)
 By.....
 (Officer) (Title)

AFFIDAVIT

State of New York, }
 County of..... } ss.:

....., being duly sworn, says that he is the officer above named, that he has read the foregoing application and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein specifically stated as made on information and belief, and that as to those matters he believes it to be true.

.....
 (Name of affiant)

Subscribed and sworn to before me this
 day of 19...

.....
 Notary Public

EXCEPTION OF CERTAIN CONTRACTS

XX. Nothing herein shall be construed as applicable to schedules of rates and forms of contracts relating to service rendered to the city or State of New York, or to the United States government, save that every gas corporation shall file with the Commission a copy of every contract relating to such service made with the city or State of New York or with the United States government, within ten days from the receipt of the signed contract by the company, but in no event shall more than three months from the date of signing of any such contract be allowed to elapse before a copy thereof shall be filed with the Commission.

Nothing herein shall be construed as applicable to any contract between a gas corporation and any other gas corporation relating to service rendered to such corporation, save that every gas corporation shall file with the Commission a copy of every such contract within ten days from the date of execution thereof.

EFFECTIVE DATE

XXI. This order shall take effect September 17, 1918, and shall continue in force until abrogated or modified by the Commission.

NOTICE OF ACCEPTANCE

XXII. Every gas corporation within the jurisdiction of the Public Service Commission for the First District of the State of New York shall notify the Commission within ten days after service upon it of a certified copy of this order whether the terms of this order are accepted and will be obeyed.

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

In the Matter of the Petition of the **ERIE RAILROAD COMPANY** under Section 91 of the Railroad Law for the Closing and Discontinuance of a Grade Crossing of Its Railroad by the Old Main Road Leading from Hinsdale to Cuba

Case No. 6326

(Public Service Commission, Second District, June 25, 1918)

Application of a railroad for the discontinuance of a grade crossing on an almost abandoned branch of its line.

For a number of years the Erie Railroad Company has been improving its railroad in the town of Hinsdale and in connection with that work has attempted to improve conditions at grade crossings, and to carry out a number of changes at station grounds. As one of such measures it herein seeks to eliminate the grade crossing at the Old Main highway from Hinsdale to Cuba referred to in the petition herein. This highway, known as the Old Main road, crosses the Erie railroad at grade on a very sharp skew. The application was opposed by the town of Hinsdale on the ground that the proposed change would result in the introduction of grades on the State highway in excess of those now in use on the present route, and also for the reason that the new highway would probably be seriously blocked in the winter by snowdrifts. *Held*, that the town is misinformed in reference to the first objection herein stated, and that as to the possibility of snowdrifts, they are no more serious at this point than at countless other locations in the State. Application granted with the restrictions stated in the order.

BY THE COMMISSION.—During the years 1906 and 1907 the Erie Railroad Company double tracked and otherwise improved its railroad in the town of Hinsdale, and in connection with this work attempted to improve conditions at grade crossings and to carry out improvements at station grounds, etc. Following out this programme, it proposed to eliminate the grade crossing of the Old Main road from Hinsdale to Cuba, referred to in this petition, by constructing a new road on the south side of its railroad and

for its major distance parallel thereto from the Old Main road westerly 2,300 feet to a street called Elm street, a north and south highway which crosses the railroad over its grade, although at that time it did not take the necessary legal steps to accomplish this end. The Old Main road from Hinsdale to Cuba crosses the Erie railroad at grade on a very sharp skew. It formerly accommodated considerable travel, but since the construction of the state road system a large part of the traffic has been diverted to another direction so that at the present time the traffic is comparatively light. The testimony in the case, indicating a fair average of highway traffic per day, shows the following crossing movements: pedestrians, ten; vehicles of all kinds, fifteen; total number of trains, thirty-four.

In accordance with the application, the petitioner is willing to bear the entire cost of the improvement, intending to charge no part thereof to either the State or the town of Hinsdale: the estimated cost of the entire improvement being \$7,179.03, of which there has already been expended by the railroad corporation the sum of \$5,104.03.

The improvement is opposed by the town of Hinsdale, mainly for the reason that grades will be introduced in the highway system which are in excess of those on the present route, and for the additional reason that the new highway will probably be seriously obstructed in winter time by snowdrifts. The Commission has investigated the first and probably the more serious of these two objections, and is satisfied that the town is misinformed with reference thereto; and as to the latter, it does not consider the possibility of snowdrifts to be more serious at this point than at countless other locations in the State.

Upon this application, after proper notice to all parties in interest, a public hearing as required by law was held by the Commission at Olean on May 10, 1918, due proof of publication of such notice and of personal service thereof upon property owners being of record. At this hearing appeared G. R. James and Dowd & Quigley for the Erie Railroad Company; George A. Larkin for the Town of Hinsdale; and property owners D. G.

Hedden, T. H. B. Rogers, and A. L. Gardner. Upon the evidence submitted the Commission has decided that the petition be granted. It is therefore

Ordered: 1. That the grade crossing of the Erie railroad by the Old Main road from Hinsdale to Cuba be closed and discontinued, and that highway travel be diverted therefrom by means of a new highway on the south side of the Erie railroad to Elm street, substantially as shown upon a plan dated January 20, 1917, attached to the petition herein; said highway to be constructed and improved in accordance with plans and specifications subject to the approval of this Commission; said plans and specifications to embody the following requirements: All fences, where necessary, to be repaired, and new fences if required to be constructed; guard-rails adjacent to the traveled portion of the roadway to be provided where embankments are two feet or more in height; ditches to be constructed and surface water led to channels of proper capacity in order to insure rapid run-off and proper drainage of the new highway. If necessary, culverts to insure said condition shall be provided. The material which has been deposited on the road through landslides or wash shall be removed. The intersection of the new highway with the Old Main road shall be so made as to provide an easy turn for vehicles. The new highway shall be surfaced with gravel or stone for a width of not less than fourteen feet and a depth of about six inches.

2. That in pursuance of its consent and agreement as stated in the petition herein, the Erie Railroad Company shall assume, pay, and discharge the entire cost and expense of the construction and work herein authorized and provided for, including the cost of any lands, rights, or easements necessary or required for the purpose of carrying out the provisions of this order, and of any land or other damages whatsoever which may arise by virtue hereof, including the closing of the old grade crossing. This order being granted upon the express condition that no financial liability or obligation whatsoever shall attach to or fall upon the State of New York or town of Hinsdale on account of the acquisition of

lands, rights, or easements necessary or required, the construction and work, or for any other incidental expenses herein authorized and provided for.

The acceptance of this order by the Erie Railroad Company shall be deemed as an undertaking on its part to save the State of New York, this Commission, and the town of Hinsdale harmless from all costs, expenses, claims, or demands whatsoever on account of this order and of any of the provisions thereof.

In the Matter of the Complaints of FRANK GALGANO, DOMINICK TELESKO, CHARLES LORD, and JOHN LAMBERT, JR., of New Rochelle, against WESTCHESTER LIGHTING COMPANY, Asking that Mains be Laid and They be Supplied with Gas at Their Residences

Case No. 6267

In the Matter of the Complaint of EDWARD STETSON GRIFFING, as Mayor of New Rochelle, against WESTCHESTER LIGHTING COMPANY, Asking that Gas Lamps be Furnished to Light Streets in Highland Park

Case No. 6306

(Public Service Commission, Second District, June 27, 1918)

Authority of the Commission to order extensions to the plant of a gas corporation or electrical corporation — how limited.

Reasonableness of proposed extension prerequisite to granting such order.

The authority of the Public Service Commissions of New York State to order extensions to the plant of a gas corporation or an electrical corporation is limited by statute; only a reasonable extension may be ordered.

It is not reasonable to require a corporation to lay over 1,800 feet of mains at a cost in excess of \$3,800 for the purpose of supplying five dwelling houses, two of which are not piped for gas, and ten street lamps with gas, and there is no prospect of any additional demand in the immediate future, and it is possible to obtain electricity for light.

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H. G. K. Heath, for the complainants in case No. 6267.

G. C. Otto, for the complainant in case No. 6306.

John J. Crennan and Martin S. Decker, for the respondent in both cases.

BARHITE, Commissioner.—The above cases were brought against the same defendant; they relate to the same matter, they were tried together, and may properly be considered in one memorandum. In case No. 6306 the mayor of the city of New Rochelle asks that the Commission issue an order directing the Westchester Lighting Company to install ten gas lamps in the public streets of a section of the city known as Highland Park. In case No. 6267 the complainants Galgano, Telesco, and Lord live upon Alpine road, and the complainant Lambert upon Errol place, and ask that mains may be laid and gas furnished at their several dwellings. The streets connect with Perth avenue. All of the streets are in Highland Park. Whether or not Perth avenue, Alpine road, and Errol place are in reality public streets was sharply contested upon the trial, but in view of the position taken upon the merits of these applications it is unnecessary to pass upon that question.

A map of Highland park was filed in 1896. That the particular part of the park under consideration has not been a popular residential section is shown by the fact that the proposed extension, if made, will serve only five houses, two of which are not piped for gas. The company has no other requests for gas from lot owners in the section under consideration. No application has been made to the building department of the city for permits to erect buildings. There are no improvements in the vicinity, no established grades, no sidewalks, no sewers, no curbs. Photographs were submitted in evidence which show that the so-called streets do not reach the dignity or possess the attainments of an ordinary country road. In one street there is water furnished by a private water company. There are no street signs. Previous to June, 1917, no work was done upon any of those streets by the city; after that date some work was done upon

one of those streets "to make it firm, to make it passable for us," one of the witnesses testified.

There are two routes which might be used for the desired extension: routes Nos. 1 and 2. Route No. 1 is 1,836 feet in length; route No. 2 is 1,928 feet in length. Over route No. 1, to meet the wants of the city and the requirements of the five possible private consumers, would cost the company \$3,820.29; leaving out the street lighting the cost would be \$3,540.60. To serve the five possible consumers would require the construction of 367 feet of gas mains per consumer as against an average construction of 49.8 feet per customer. The estimated yearly consumption of gas for the five consumers based upon the average yearly consumption of private parties throughout the city and upon the yearly amount which had been used by two of the prospective customers in other parts of the city is 115,000 cubic feet, yielding a gross income of \$126.50. The present rate is \$1.10 per 1,000 feet without discount. For the ten street lights under its contract with the city the company would receive \$260. Of this amount, for lighting and extinguishing and lamp maintenance work, the company would pay \$120, leaving net \$140. The ten lamps would burn 140,000 feet of gas per year which makes the rate for public lighting \$1 per 1,000 feet. The estimated cost of the manufacture of gas for the year 1918 was 94.98 cents per 1,000 cubic feet. The actual cost for the first three months of the year was 98.65 cents per 1,000 cubic feet, and this cost will increase rather than diminish.

The above figures show a profit of \$14.94 upon an investment of \$3,800. While an extension to the plant of a public service corporation may be required although it is shown that such extension may not bring in a profit, there is a limit beyond which extensions should not be ordered: that limit is found in the terms of the statute (Public Service Commissions Law, art. IV, § 66, subd. 2). This Commission is given power to order *reasonable* improvements and extensions.

The contract between the city and the company provides that the number of gas lamps may be at any time increased "along the lines of gas mains." Under the clause quoted the attorney

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for the mayor at the hearing admitted that the interest of the city was secondary to that of the other complainants; that unless the Commission orders the extension of the mains for the private complainants the case of the city will fail.

Taking into consideration the cost of the proposed extension, the limited demand for gas arising from the extension, the slight prospect for any further demand in the future, the high price and difficulty of obtaining labor and materials at the present time, the lack of real need for the extension, the prayer of the petitioners should be denied until such time as changing conditions may be more suitable for the request. This conclusion will not prevent the installation of proper facilities for lighting, as the house of one of the complainants is already lighted with electricity; and the dwellings of the others, and the streets if necessary, can be supplied with light in the same manner.

All concur.

In the Matter of the Complaint of RESIDENTS OF BINGHAMTON AND JOHNSON CITY against BINGHAMTON RAILWAY COMPANY as to Proposed Stopping of Sale of Certain Passenger Tickets, and on the Commission's Own Initiative

Case No. 6352

(Public Service Commission, Second District, June 27, 1918)

Circumstances under which special ticket books representing reduced fare rates on an interurban railway may be discontinued.

The Binghamton Railway Company has for a number of years issued a twelve-ride ticket book good for passengers between Binghamton and Endicott, which sold for one dollar, making each ride cost eight and one-third cents, the book being good only during rush hours morning and evening for the benefit of employees of manufactories at Endicott who reside in Binghamton. The company also has been issuing a twelve-ride ticket book good for passengers between Johnson City and Endicott, sold at sixty cents, good only during rush hours morning and evening on certain cars, this book being issued also for the employees of manufactories between Johnson City and Endicott. From the evidence

adduced, *held*, that the cost to the company is greater than the revenue from these books and that the company should no longer be compelled to issue them.

Harry C. Perkins, for complainants.

Curtiss, Keenan & Tuthill, for Binghamton Railway Company.

FENNELL, Commissioner.—There was filed with this Commission on February 15, 1918, a complaint from residents of Binghamton and Johnson City and other nearby places against Binghamton Railway Company protesting —

1. The proposed discontinuance by said company on February 25, 1918, of the sale of a twelve-ride ticket book good for passengers between Binghamton and Endicott, which is sold for one dollar, making each ride cost eight and one-third cents; this book is good only during rush hours morning and evening and has no transfer privileges in Binghamton. The complaint alleges that this book has been sold for over thirteen years, and has enabled employees of manufactories at Endicott to live in Binghamton where better housing facilities are available than in Endicott; that with this book withdrawn the lowest rate left is one of twenty-five cents for the round trip between Binghamton and Endicott, the regular one-way fare being fifteen cents;

2. The proposed discontinuance by said company on February 25, 1918, of the sale of a twelve-ride ticket book good for passengers between Johnson City and Endicott, which are sold for sixty cents; this book is good only during rush hours morning and evening on certain cars; with this book withdrawn the lowest rate left is fifteen cents for the round trip between Johnson City and Endicott.

Three hundred and seventy-nine of the signers of the complaint live in Binghamton, forty-one live in Johnson City, and eighteen live in Port Dickinson, Hooper, Union, and Endicott.

The company had filed with the Commission a tariff showing that the sale of these books was to be stopped; and also that the sale of two other reduced rate book tickets between the city of Binghamton and Country Club station was to be stopped;

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but as to these Country Club station books no complaint has reached the Commission.

It appearing to the Commission that the stoppage of the sale of these books should not be permitted pending an investigation of the reasonableness of such action, the tariff was suspended until the twenty-ninth instant, and public hearings in the matter were held by Commissioner Fennell at Binghamton on March fifteenth and May twenty-fourth, at which those named above appeared, as well as certain of the complainants in person.

It appears from the evidence that the Erie railroad operates what may be called special trains to carry employees of the manufactories at Endicott and Johnson City to and from Binghamton, the fare on these trains being five cents each way, and that they carry from eight hundred to twelve hundred passengers between said points daily; it also appears that during the year 1917 passengers using said book tickets on the Binghamton railway between Johnson City and Endicott used an average of fifty-six per day, and between Binghamton and Endicott used an average of sixty and one-half per day. The answer of the company alleges that the cost of carrying the passengers using said book tickets is considerably in excess of the revenue received from them, and this was not contested at the hearing; that the revenue per mile under the dollar book is less than half a cent counting the round-trip of the car, and about the same under the sixty cents book; that a special service is required.

The Commission believes the oral evidence and papers establish that the cost is greater than the revenue from these books and that the company should no longer be compelled to issue them. This is not a finding that under all circumstances return must equal cost in such cases; but in this case, comparatively few using these books, a special service being required, and it being evident that the Erie railroad carries most of the employees in this territory, the Commission concludes it would be unjust to require the company to continue the sale of said books.

Accordingly an order will be entered annulling the suspension of the portion of the tariff in question and dismissing this complaint.

All concur.

In the Matter of the Petition and Supplemental Petition of IROQUOIS UTILITIES, INC., for Approval *Nunc Pro Tunc* of Consolidation, for Authority to Issue Capital Stock, and for Authority to Issue a Mortgage and Mortgage Bonds

Case No. 6458

(Public Service Commission, Second District, June 27, 1918)

Authority granted *nunc pro tunc* for consolidation of two light and power companies into petitioning corporation, for issuing certain capital stock and to execute a trust mortgage and issue certain bonds thereunder.

The Iroquois Utilities, Inc., makes application herein that the consolidation into it of the Gowanda Light and Power Corporation and the Randolph Light and Power Company, Inc., be authorized *nunc pro tunc* as of May 8, 1918. The petition was originally filed herein May 16, 1918, and two supplemental petitions were thereafter filed and the three petitions were referred to the division of capitalization, which reported thereon June 18, 1918. Upon the facts adduced at a public hearing duly held, and upon the said petitions and report the application was granted. Ordered that the petitioning company be authorized to issue \$30,000 par value of its 7 per cent cumulative preferred stock, to be used for the purpose of even exchange for a like amount of preferred stock of the Randolph Light and Power Company, Inc., and to issue \$22,000 of its common capital stock for the purpose of even exchange for the common capital stock of the Gowanda Light and Power Corporation and of the Randolph Light and Power Company, Inc., and the petitioning company was also authorized to execute and deliver to the Central City Trust Company, of Syracuse, as trustee, a deed of trust or mortgage to secure an issue of bonds in the aggregate of \$1,000,000 face value, and to issue \$89,000 of 6 per cent thirty-year first mortgage bonds under said mortgage, the proceeds of the sale thereof to be used as set forth in the order.

Petition filed May 16, 1918.

Supplemental petition filed May 29, 1918.

Second supplemental petition (letter) filed June 16, 1918.

Report of Division of Capitalization dated June 18, 1918.

Hearing held June 26, 1918.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

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1. That the consolidation of the Gowanda Light and Power Corporation and the Randolph Light and Power Company, Inc., into the Iroquois Utilities, Inc., as of May 8, 1918, is hereby authorized *nunc pro tunc*.

2. That the Iroquois Utilities, Inc., is hereby authorized to issue \$30,000 par value of its 7 per cent cumulative preferred stock and to use such stock solely for the purpose of even exchange for a like par amount of preferred stock of the Randolph Light and Power Company, Inc.

3. That the Iroquois Utilities, Inc., is hereby authorized to issue \$22,000 par value of its common capital stock and to use such stock solely for the purpose of even exchange for:

(a) Common capital stock of the Gowanda Light and Power Corporation having a par value of	\$5,000
(b) Common stock of the Randolph Light and Power Company, Inc., having a par value of	17,000
	<hr/>
	\$22,000

4. That the Iroquois Utilities, Inc., is hereby authorized to execute and deliver to the Central City Trust Company, of Syracuse, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or mortgage upon all its plant and property, to be dated the 1st day of July, 1918, to secure an issue of first mortgage thirty-year 6 per cent gold bonds to the aggregate amount of \$1,000,000 face value, bearing interest at the rate of 6 per cent per annum, a copy of which has been filed with the Commission herein, and that the form thereof so filed is hereby approved; provided that said company shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as herein or hereafter authorized by the Commission.

5. That upon the execution and the delivery of said indenture so authorized there shall be filed with this Commission a copy thereof in the form in which it was executed and delivered

together with an affidavit by the president or other executive officer of the company stating that the indenture as executed and delivered is the same as that herein approved by the Commission, and no bonds secured thereby shall be issued or sold until the provisions of this clause have been complied with.

6. That the Iroquois Utilities, Inc., is hereby authorized to issue \$89,000 face value of its 6 per cent thirty-year first mortgage gold bonds under the aforesaid mortgage, and to sell said bonds for not less than 90 per cent of their face value to realize net proceeds of at least \$80,100.

7. That the proceeds of said bonds so authorized which shall not be less than \$80,100, shall be used solely and exclusively for the following purposes:

1. For the discharge of indebtedness of the Gowanda Light and Power Corporation outstanding at January 31, 1917, as set forth in an order dated May 15, 1917, in Case 5985, or the renewals thereof, as follows:

(a) Funded debt — real estate mortgage.....	\$6,500 00
(b) Bills payable (G. M. Gest).....	32,680 23
(c) Bills payable.....	25,774 79
(d) Accounts payable:	
G. M. Gest.....	7,167 25
Sundry	4,988 02
	<hr/>
	\$77,110 29

Less proceeds of stock authorized to be issued by order dated May 15, 1917, sold and used for the payment of accounts payable due G. M. Gest....	5,000 00
	<hr/>
	\$72,110 29

2. For the discharge of indebtedness of the Randolph Light and Power Company, Inc., outstanding at January 31, 1917, as set forth in an order dated March 1, 1917, in Case 5914, or the renewals thereof, as follows:

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(a) Funded debt — real estate mortgage	\$6,000 00	
(b) Bills payable (G. M. Gest)... .	5,434 69	
(c) Bills payable.....	37,209 61	
(d) Accounts payable.....	3,006 24	
		<u>\$51,650 54</u>
Less amount of "Bills Payable (G. M. Gest)" discharged with proceeds of loan from Sun Life Assurance Company per verified reports in Case 5914.....	18,000 00	
		<u>\$33,650 54</u>
To discharge note owing to the Sun Life Assurance Company which is secured by pledge of \$50,000 bond...	18,000 00	\$51,650 54
		<u>\$123,760 83</u>
Amount unprovided for.....		<u>\$43,660 83</u>

8. That pending the sale of the bonds herein authorized the Iroquois Utilities, Inc., may, in the alternative, pledge at not less than 90 per cent of their face value all or any part of said bonds as collateral security for any of its loans provided that the following prohibitions are observed:

(a) That the principal of such loans for which said bonds are pledged shall in no event be less than 90 per cent of the face value of the bonds pledged as collateral security therefor.

(b) That said bonds shall not be pledged for a greater period than one year from the date of this order without the further order of this Commission.

(c) That the actual cost of the money to be procured through the issuance of the short term loans above mentioned shall not be greater than 6 per cent per annum.

9. That the notes, or the proceeds thereof, for which bonds

herein authorized are pledged as collateral security shall be used solely and exclusively for the purposes for which the bonds or their proceeds are authorized to be used as enumerated in clause 7 of this order.

10. That the Iroquois Utilities, Inc., shall for each six months' period ending June thirtieth and December thirty-first file not more than thirty days from the end of such period a verified report which shall show:

(a) What securities have been sold, exchanged or pledged during such period.

(b) The dates of such sales, exchanges or pledgings.

(c) To or with whom such securities were sold, exchanged or pledged.

(d) The amount and description of stock which was received in exchange.

(e) What proceeds were realized from such sales.

(f) The principal, term and interest rate of each loan for which such bonds are pledged.

(g) The total face value of bonds which remain pledged as collateral security for said loans on the closing date of such period.

(h) Any other terms and conditions of such transactions.

(i) In detail the amount of the proceeds of the bonds or loans herein authorized which has been expended during such period for each of the purposes specified herein.

Such reports shall continue to be filed until all of said securities shall have been sold, exchanged or pledged and the proceeds expended in accordance with the authority contained herein, and if during any period no securities were sold, exchanged or pledged, or proceeds expended, the report shall set forth such fact.

11. It is nevertheless expressly provided that in all respects other than as directed in clauses Nos. 1 of orders entered simultaneously herewith in Cases 5914 and 5985 this order shall not be effective, and particularly that no securities shall be issued or sold, exchanged or pledged hereunder by the applicant, nor shall the issue, sale, exchange or pledging of any such securities be

deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of said clauses shall have been made, reported to and approved as sufficient by this Commission.

12. That the Iroquois Utilities, Inc., shall within a reasonable time after the consummation of the consolidation ratified in this order, file with the Commission all such annual or other periodic reports as the Commission may be required by law to obtain or which it is empowered by law to exact and shall require, concerning its operations and financial or corporate transactions during the period subsequent to the date of such report last filed and prior to the effective date for accounting purposes of the consolidation hereby ratified.

13. That the authority contained in this order to issue securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days of the service hereof the company shall advise the Commission whether or not it accepts the same with all its terms and conditions, and such order shall be of no force or effect until such acceptance has been filed.

Finally it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Amended Petition of ALBANY SOUTHERN RAILROAD COMPANY which Asks Under Subdivision 10, Section 8, Railroad Law, and Sections 55 and 69, Public Service Commissions Law, Authority to Issue a Mortgage and Bonds and a Collateral Trust Indenture and Notes

Case No. 6165

(Public Service Commission, Second District, July 2, 1918)

Authority granted a public service corporation for leave to issue a mortgage and bonds and a collateral trust indenture and notes.

The petition herein was filed by the Albany Southern Railroad Company on August 11, 1917, which petition was reported on by the division of capitalization, and thereafter an amended petition was filed March 14, 1918, and the matter again referred to the capitalization division, which made its final report June 5, 1918. An order was then made on the following day, but a second amendatory petition was filed on June 21, 1918. The Commission, upon the said three petitions and the facts adduced at a public hearing and upon the reports, granted the application of the petitioner with the usual restrictions.

Petition filed August 11, 1917.

Report of division of capitalization dated February 21, 1918.

Amended petition filed March 14, 1918.

Hearing held March 20, 1918.

Final form of proposed mortgages filed May 31, 1918.

Report of division of capitalization dated June 5, 1918.

Order entered under date of June 6, 1918.

Second amendatory petition filed June 21, 1918.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That ordering clauses Nos. 1 and 8 of the order herein entered under date of June 6, 1918, are hereby modified and amended to read as follows:

1. That the Albany Southern Railroad Company is hereby

authorized to execute and deliver to the Empire Trust Company of New York, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or mortgage upon all its plant and property, dated the first day of March, 1918, to secure an issue of first refunding mortgage thirty-year gold bonds to the aggregate amount of \$3,000,000 face value, bearing interest at the rate of 6 per cent per annum, a copy of which indenture has been filed with the Commission herein and is marked "revised and corrected to July 1, 1918," and that the form thereof so filed is hereby approved; provided that said company shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as herein or hereafter authorized by the Commission.

8. That the Albany Southern Railroad Company may, in the alternative and pending the sale of the \$550,000 face amount of 7 per cent three-year gold notes herein authorized to be issued, pledge all or any part of said notes as collateral security for its short term loans provided that the following prohibitions are observed:

(a) That the principal of such loans for which said notes are pledged shall in no event be less than 76 per cent of the face value of the notes pledged as collateral security therefor.

(b) That said notes shall not be pledged for a greater period than one year from the date of this order without the further order of this Commission.

(c) That the actual cost of the money to be procured through the issuance of the short term loans above mentioned shall not be greater than 6 per cent per annum.

(d) That the loans, or the proceeds thereof, for which the 7 per cent three-year gold notes herein authorized are pledged as collateral security shall be used solely and exclusively for the purposes for which these notes or their proceeds are authorized to be used as enumerated in clause No. 9 of this order.

2. That subdivision (b) of ordering clause No. 9 of the order entered herein under date of June 6, 1918, is hereby modified and amended to read as follows:

(b) For the discharge of floating liabilities outstanding at June 30, 1917, or the renewals thereof, as follows:

Bills payable	\$25,000 00
Accounts payable	69,403 21
Taxes accrued	23,366 81
Interest	24,820 48
Consumers' deposits.....	7,532 79
Coupon interest matured.....	1,375 00
Other unfunded debt.....	1,737 94
	<hr/>
	\$153,236 23
	<hr/>

3. That ordering clause No. 12 of the order entered herein under date of June 6, 1918, is hereby modified and amended in such manner as to permit the filing of a satisfactory verified stipulation accepting this order and the order of June 6, 1918, within thirty days from the date of this amendatory order.

4. That in all other respects the terms and conditions of said order of June 6, 1918, shall remain in full force and effect.

In the Matter of the Petition of ERIE RAILROAD COMPANY under Section 55, Public Service Commissions Law, for Authority to Issue \$12,500,000 of Series B Gold Bonds under its Refunding and Improvement Mortgage dated December 1, 1916

Case No. 6472

(Public Service Commission, Second District, July 2, 1918)

Application by a railroad company for leave to issue certain bonds under its refunding and improvement mortgage.

Permission granted to said company to issue certain short term notes.

The Erie Railroad Company on June 11, 1918, filed its petition, in which it asked for authority to issue certain gold bonds under its refund-

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ing and improvement mortgage dated December 1, 1916. The petition was referred to the division of capitalization which reported in favor thereof on June 28, 1918, on which same date a public hearing was given. The application, upon the report and the facts adduced at the hearing, was granted, the details of the said bond issue being stated in the first order herein.

The Commission also made an order authorizing the petitioning company to issue certain promissory notes under the restrictions and for the purposes specifically set forth in the second order herein.

Petition filed June 11, 1918.

Report of division of capitalization dated June 28, 1918.

Hearing held June 28, 1918.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Erie Railroad Company is hereby authorized to issue \$12,500,000 face value of its 6 per cent twenty-year "series B" refunding and improvement mortgage gold bonds under a certain indenture, deed of trust or mortgage, dated the 1st day of December, 1916, given to the Bankers Trust Company, as trustee, to secure an authorized issue of bonds of a total face value of \$500,000,000.

2. That said bonds of the total face value of \$12,500,000 may be sold for not less than 90 per cent of their face value to realize net proceeds of at least \$11,250,000.

3. That the proceeds of said bonds so authorized, which shall not be less than \$11,250,000, shall be used solely and exclusively for the following purposes:

(a) To be applied toward the reimbursement of the treasury of the company for expenditures made from income for capital purposes to and including December 31, 1917.....

\$5,500,000

(b) To be applied towards the expenditures made and to be made subsequent to January 1, 1918, on account of the items of work shown upon Exhibits J and J-1 filed with the petition herein, or some one or more of them, the esti-

mated amount to be expended therefor during the year 1918 being summarized as follows:

Exhibit J	\$7,133,535	
Exhibit J-1	2,733,415	
		\$9,866,950
		\$15,366,950
Amount unprovided for.....		\$4,116,950

in so far as the same may be applicable, provided:

(1) That the proceeds of such bonds shall be applied toward the cost of new construction summarized in subdivision (b) hereof only in so far as such new construction is a real increase in the road and equipment of the petitioner as defined by the classification of investment in road and equipment of steam roads adopted by this Commission.

(2) That there shall be no charges to road and equipment on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or in a proper case, where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes, marked (a) and (b) respectively, subject to the limitations herein contained, a sum less than the amounts set opposite thereto, no portion of the proceeds realized from the sale of such bonds over the actual costs thereof shall be used for any purpose without the further order of this Commission.

(4) That the unit prices contained in Exhibits J and J-1 of the petition are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to road and equipment, but are intended and shall be construed only to be a present

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estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the classification of investment in road and equipment of steam roads.

4. That the Erie Railroad Company shall for each six months' period ending June thirtieth and December thirty-first file not more than thirty days from the end of such period a verified report which shall show:

- (a) What bonds have been sold during such period.
- (b) The dates of such sales.
- (c) To whom such bonds were sold.
- (d) What proceeds were realized from such sales.
- (e) Any other terms and conditions of such sales.
- (f) With respect to subdivision (b) of ordering clause 3 of this order there shall be shown:

(1) In detail the amount of the proceeds of the bonds herein authorized which has been expended during such period for each of the purposes detailed in Exhibits J and J-1 of the petition herein, and the account or accounts under the classification of investment in road and equipment of steam roads to which the expenditures for such purposes have been charged, giving all details of any credits to road and equipment in connection with such expenditures.

(2) A summary of the expenditures for each of such purposes during the period covered by the report.

(3) A summary by the prescribed accounts showing the expenditures during such period.

(g) There shall be shown the amount of bond proceeds used during such period for the purpose specified in subdivision (a) of clause 3 of this order.

In reporting under subdivisions (2) and (3) of section (f) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period.

Such reports shall continue to be filed until all of said bonds shall have been sold and the proceeds expended or used in

accordance with the authority contained herein, and if during any period no bonds were sold or proceeds expended or used, the report shall set forth such fact.

5. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof, and before any bonds are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president or vice-president and secretary or assistant secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

6. That this proceeding is hereby continued upon the records of the Commission until the examination which is to be made of the books, accounts and property of the petitioner herein shall have been concluded and the corrections, if any, which by reason of such examination this Commission shall determine to be proper and necessary have been made, accepted by the corporation and entered in the accounts of said company to the satisfaction of the Commission; and this order is expressly conditioned upon acceptance by the corporation of any such determination by the Commission and compliance with any subsequent direction or order of the Commission in the premises.

Finally it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Upon the petition as filed, the report of the division of capitalization and upon the facts adduced at the hearing of June 28, 1918, hereinbefore mentioned, the Commission also made an order authorizing the petitioning company to issue certain promissory notes under restrictions and for purposes specifically set forth in the following separate order:

1. That the Erie Railroad Company is hereby authorized to

issue its promissory note or notes up to a principal sum of \$12,500,000 such note or notes to run for not more than two years from their respective dates and to bear interest at not exceeding 7 per cent per annum; provided that only such principal sum of such note or notes shall be issued as may be necessary to accomplish upon the terms set forth in ordering clause No. 2 herein the pledging of the \$12,500,000 face amount of series B 6 per cent twenty-year refunding and improvement mortgage gold bonds authorized to be issued by order of even date herewith in this proceeding.

2. That for the purpose of securing the notes authorized to be issued by ordering clause No. 1 herein and/or such other notes as shall run for less than one year, the Erie Railroad Company is hereby authorized to pledge \$12,500,000 face amount of its series B 6 per cent twenty-year refunding and improvement mortgage gold bonds, authorized to be issued by order of even date herewith in this proceeding as collateral security for its notes upon the basis of not more than \$1,500 face amount of said bonds for each \$1,000 face amount of notes; provided that no notes issued upon the collateral security of the bonds herein authorized to be pledged shall bear interest at a greater rate than 7 per cent per annum.

3. That the proceeds of the notes herein authorized shall be used for the same purposes for which the proceeds of the series B 6 per cent refunding and improvement mortgage gold bonds were directed to be used by order of even date herewith in this proceeding.

4. That the Erie Railroad Company shall within ten days after the issuance of each note so authorized and for which bonds may be pledged under the authority contained herein file with this Commission a verified report which shall show the date, amount, term, and interest rate of each note so issued and the face amount of bonds which have been pledged as collateral security therefor, and that in addition the Erie Railroad Company shall for each quarter ended September thirtieth, and December thirty-first, March thirty-first and June thirtieth file

not more than thirty days after the end of such period a verified report which shall show all of the notes which have been issued during such period and all of the terms thereof. Such ten-day and quarterly reports shall continue to be filed until all of the bonds herein authorized to be pledged shall have been hypothecated.

5. That the Erie Railroad Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report which shall show the use which has been made of the proceeds of the notes which have been issued and for which bonds have been pledged under the authority contained herein, such reports to be in the form and to contain the information required by subdivisions (f) and (g) of ordering clause No. 4 of the order of even date entered in this proceeding.

Such reports shall continue to be filed until all of the bonds the pledging of which is authorized herein have been hypothecated and the proceeds of such pledgings expended and used in accordance with the authority contained herein, and if during any period no notes were issued or proceeds expended or used, the report shall set forth such fact.

6. That the authority contained in this order to issue notes is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any notes are issued pursuant hereto and within thirty days of the service thereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president or vice president and secretary or assistant secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Finally it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said notes herein authorized is reasonably required for the purposes described in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of Complaints against THE PAVILION NATURAL
GAS COMPANY Based upon Inadequacy of Service

Case No. 6304

(Public Service Commission, Second District, July 9, 1918)

Limitations upon the power of the Commission in regard to natural gas companies.

Rule in case of shortage of natural gas supply.

The Pavilion Natural Gas Company operates in several counties of western New York. It also furnishes the Tri-County Natural Gas Company with the gas supplied by that company to its customers. The volume of gas obtainable became reduced but there is no authority in the Commission to compel natural gas companies to put in a supplemental plant for manufactured gas until further legislative action has been had.

The Commission, however, can compel an equitable distribution of the natural product. An examination of the records shows that natural gas is very unequally distributed among the customers of the company, and when there is a shortage the greatest good to the greatest number compels a reduction in the amount of gas used by some consumers and that others not in the preferred class shall have their supply discontinued. *Held*, that under sections 65 and 66 of the Public Service Commissions Law the Commission has authority to prevent unfair distribution of natural gas.

C. Walter Daggs and James M. E. O'Grady, for the Pavilion Natural Gas Company.

Arthur E. Sutherland, for the village of Perry.

William F. Huyck, for the village of LeRoy.

James E. Norton, for the village of Warsaw.

A. C. Olp, for the village of Mount Morris.

O. C. Lake, for Ewart and Lake.

W. P. Randall, for Clement, McDowell and Pierson, and Ewart and Lake.

B. B. Conable, for the Warsaw-Wilkinson Company.

C. W. Gamble, for the village of Moscow.

Daniel J. Kenefick, for the Tri-County Natural Gas Company.

BARHITE, Commissioner.—In case No. 6283, "In the Matter of the Complaint of the Mayor of Batavia against Alden-Batavia Natural Gas Company as to Service," this Commission has expressed its views with regard to the natural gas situation in western New York. It is not necessary to again state what was said in that case.

Complaint has been made by a number of villages with regard to the service rendered by the Pavilion Natural Gas Company which operates in the counties of Western New York. This company also furnishes to the Tri-County Natural Gas Company the supply of gas furnished by that company to its customers.

An investigation disclosed the same condition which was shown to exist in the Batavia case; the same inability to furnish gas; the same failure on the part of the company to voluntarily take any real and effective steps to increase the supply; and the same want of power on the part of this Commission to order the company to obtain a supply of manufactured gas to be used in times of emergency. Even the courts are powerless until the Legislature so amends the statute as to give the courts or this Commission the power to compel natural gas companies to take the only course which will enable them to furnish a full and adequate supply of the commodity for which they demand and receive pay.

The investigation also shows the unequal distribution of the gas, a distribution which if corrected may inconvenience the few but will give relief and protection to the greatest number of users.

An examination of the record and of the use of gas in five of the largest villages served by the Pavilion Natural Gas Company during one of the winter months of the years 1917-1918 is sufficient to show the unequal distribution of gas.

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In Avon, a trifle over 12 per cent of the consumers used over 44 per cent of the gas. Cutting out all industrial users and limiting domestic consumers to 25,000 cubic feet per month would have saved 1,114,000 cubic feet out of 5,218,900 cubic feet furnished, or over 21 per cent. The average use per consumer for the one month was 12,455 cubic feet.

In Warsaw, less than 2 per cent of the customers used nearly 12 per cent of the gas. Shutting off the supply from industrial consumers and limiting domestic consumers to 25,000 cubic feet per month would have saved 528,000 cubic feet per month out of 6,735,100 cubic feet furnished, or nearly 8 per cent. The average per customer during the month was 5,939 cubic feet.

In Perry, 5 per cent of the customers used over 26 per cent of the gas. Cutting out industrials and limiting domestic consumers to 25,000 cubic feet per month would have saved 1,730,000 cubic feet, or 15 per cent. Average per month for each customer was 8,374 cubic feet.

In LeRoy, a trifle over 4 per cent of the customers used over 17 per cent of the gas. Leaving out industrials and limiting domestic consumers to 25,000 cubic feet would have saved 465,000 cubic feet, or 5 per cent of the amount furnished. The average consumption per month was 8,180 cubic feet.

In Mount Morris, less than 10 per cent of the customers used practically 50 per cent of the gas. Preventing its use by industrials and limiting domestic consumers to 25,000 cubic feet would have saved about 16 per cent of the gas. The average use of gas was 6,320 cubic feet.

The average use per month for the five villages was 8,253 cubic feet.

The greatest good to the greatest number can be had under present conditions only by a provision for a more evenly divided supply. If the supply is more nearly adequate to the demand, a more steady pressure can be required and maintained. It is the constant change of pressure which makes serious trouble. A low pressure, if steadily maintained and the burners are adjusted to that pressure, gives more satisfactory results than a higher

pressure which drops and then rises, at least so the authorities seem to maintain. A witness asserted that the Pavilion company might increase its supply of gas by changing its method of blowing out its wells. This is a suggestion which should be carefully considered, and adopted if it will lead to better results.

A very serious question is raised by counsel for the village of Perry to the effect that the Tri-County Natural Gas Company is entitled to a supply of gas only after the requirements of previous contracts have been fulfilled. This contention is based upon certain clauses in the contract made with the Tri-County Company which are as follows:

"That the within agreement to sell and deliver natural gas to the party of the second part is made subject to a reservation on the part of the party of the first part of sufficient gas to supply for domestic use the villages of LeRoy and Pavilion, N. Y., and the consumers along the pipe line of said party of the first part, and after five years from date the villages of Perry and Warsaw, N. Y., and all consumers along main line leading thereto shall share *pro ratio* with Caledonia, N. Y., including all previous contracts and obligations as to furnishing natural gas made by the party of the first part prior to the date of this instrument, and this reservation is made part of this contract, it being understood that there has been no prior contract by the party of the first part for the sale of natural gas for manufacturing purposes, or with companies outside of the villages hereinbefore mentioned.

"If because of contract or otherwise first party should by virtue of furnishing gas to other persons other than the villages of Pavilion and LeRoy, N. Y., be unable to supply second party with the maximum amount herein mentioned, then such other parties shall not be furnished until second party has amount required up to the maximum."

It is interesting to note that the contract seeks to protect prior domestic users only, and that the Pavilion Company stipulates that it has made no contract for the sale of gas for manufacturing purposes. It would seem that up to the time of making this

contract the Pavilion Company had not contemplated the use of gas for anything except domestic purposes.

Notwithstanding the terms of the contract in question, it would not be wise to completely shut off the supply of gas from the customers of the Tri-County Company. The extreme difficulty which many of the consumers would have in obtaining light, or fuel for cooking under the conditions which now exist in the country, would make their situation one of extreme hardship. The Tri-County Company has by previous orders of this Commission been allowed to operate in its assigned territory. The company has no wells of its own and depends entirely upon the Pavilion Company for its supply of gas. Certainly no order preventing the Tri-County Company from continuing its business should be made until the interested parties have had an opportunity to present fully to the Commission their views or a proceeding has been brought solely for that purpose.

The contention of counsel for the Pavilion Company that this Commission has no jurisdiction to afford any relief is negatived by the provisions of sections 65 and 66 of the Public Service Commissions Law.

All concur.

**In the Matter of the Complaints against THE PAVILION NATURAL
GAS COMPANY, Based upon Inadequacy of Service**

Case No. 6304

(Public Service Commission, Second District, July 9, 1918)

Complaints against the Pavilion Natural Gas Company based upon inadequacy of service.

A number of complaints were filed by customers of the Pavilion Natural Gas Company, both by municipal authorities and by individuals, upon the ground that the company failed to furnish a sufficient amount of natural gas to its customers during the winter months. A number of hearings were had before one of the Commissioners in regard to the

allegations made, and upon the facts adduced at such hearings and the opinion submitted by the Commissioner the Commission held that the defendant company did not furnish a sufficient supply of natural gas during the said portion of the year and that the territory served by it depended upon the supply of natural gas to conserve the health and lives of the customers of such company.

Ordered, that the use of gas furnished by the said company during the winter months should be restricted to the requirements of domestic customers.

Further ordered, that the provisions of this order shall apply to the Tri-County Natural Gas Company as well as to the Pavilion Natural Gas Company, and that the said Tri-County Natural Gas Company observe and conform to all the provisions of this order applicable thereto.

BY THE COMMISSION.—The issues formed by the complaints and answer in the above entitled proceeding having come on to be heard before Commissioner Barhite at the city of Rochester on the 3d and the 12th days of January, the 9th day of February, the 23d day of March, the 20th day of April and the 4th day of May, 1918, and upon the various dates on which said hearings were had appearances by the interested parties were had as follows: C. Walter Baggs, Esq., and Hon. James M. E. O'Grady, attorneys for the Pavilion Natural Gas Company; Hon. Arthur E. Sutherland, attorney for the village of Perry; William F. Huyck, Esq., attorney for the village of LeRoy; Hon. James E. Norton, attorney for the village of Warsaw; A. C. Olp, Esq., attorney for the village of Mt. Morris; O. C. Lake, Esq., for Ewart and Lake, Groveland, N. Y.; W. P. Randall, Esq., for Clement, McDowell and Pierson and Ewart and Lake; B. B. Conable, Esq., attorney for the Warsaw Wilkinson Co.; C. W. Gamble, Esq., attorney for the village of Moscow, and Hon. Daniel J. Kenefick, attorney for the Tri-County Natural Gas Company; and it appearing to this Commission from an examination of the questions involved and from the evidence that the Pavilion Natural Gas Company does not and cannot furnish a sufficient supply of natural gas to its customers in the territory served by it during the winter months and that said territory is dependent upon said company for its supply of gas and that much inconvenience, suffering and danger to the health and the lives of the customers of said

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company are caused by the inability of said company to furnish the necessary amount of gas with adequate and proper pressure and that it is necessary to restrict the use of gas furnished by said company during the winter months for the purpose of conserving the supply for domestic customers.

Ordered, That all customers of the Pavilion Natural Gas Company in the territory served by it be and the same are hereby divided into two general classes to be known as "domestic consumers" and "industrial consumers;" that domestic consumers shall include the users of natural gas for heating, lighting and cooking in private houses, boarding houses and apartment houses; and users of natural gas for lighting and cooking only in hotels, restaurants, bakeries, eating houses, club houses, hospitals and charitable institutions; that all other consumers shall be known as "industrial consumers."

That from and including the first day of December in each and every year until and including the thirty-first day of March in the succeeding year no natural gas shall be furnished by the Pavilion Natural Gas Company to any industrial consumers for any purpose without the special permission of this Commission, except as hereinafter specified and excepted.

Further ordered, That from and including the first day of December in each and every year until and including the thirty-first day of March in the succeeding year no domestic consumer shall be permitted to use more than 25,000 cubic feet of natural gas in any one month counting any thirty successive days during the period above named as one month nor more than a corresponding part of said 25,000 cubic feet for a proportionate part of said thirty days, and no domestic customer shall be permitted to use gas in a furnace not originally constructed for the use of gas, and said Pavilion Natural Gas Company is hereby directed to discontinue all service to any customer who neglects or refuses to obey this order.

That the Pavilion Natural Gas Company shall attach to its pipes before the 1st day of December, 1918, within the district served by it, such a number of self registering pressure gauges as this Commission shall direct and determine and said gauges

shall be attached at such points and in such manner as this Commission shall hereafter direct. Each of said gauges shall be under the control of this Commission and access shall only be had to said gauges by such persons as shall hereafter be named by this Commission. Charts shall be taken from each of said gauges during the four months herein named by said company or by such person as may be named by the Commission at such regular intervals as may be directed by the Commission, and such charts shall be immediately filed as directed by the Commission.

That the standard pressure to be maintained in the service pipes of all customers of said Pavilion Natural Gas Company shall be at least four ounces per square inch.

That the provisions of this order shall not apply to any customer of the Pavilion Natural Gas Company or the Tri-County Natural Gas Company who shall be engaged in any business deemed essential by the United States government for its use in the conduct of the war in which the government is now engaged and in which business the government of the United States deems the use of natural gas to be necessary.

Further ordered, That the Pavilion Natural Gas Company and the Tri-County Natural Gas Company shall on or before the 1st day of August, 1918, notify all of their customers of the provisions of this order by publishing a copy thereof at least once in two newspapers published in the district served by said companies and by serving a copy thereof either personally or by mail upon all industrial consumers; that said publication in said newspapers shall be made by the Pavilion Natural Gas Company, and said Pavilion Natural Gas Company and the Tri-County Natural Gas Company shall each serve a copy of this order upon the industrial consumers respectively served by them.

That the provisions of this order shall apply to the Tri-County Natural Gas Company as well as to the Pavilion Natural Gas Company, and that said Tri-County Natural Gas Company shall observe and conform to all the provisions of this order applicable to it.

Further ordered, That the Pavilion Natural Gas Company and

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the Tri-County Natural Gas Company shall each within ten days after the receipt by it of a copy of this order notify the Commission whether or not the terms of this order are accepted and will be obeyed.

In the Matter of the Complaint under Sections 71 and 72, Public Service Commissions Law, of GEORGE W. LANE, AS MAYOR OF CORNING, against CRYSTAL CITY GAS COMPANY as to Proposed Increase in Price of Natural Gas Furnished Customers

Case No. 6340

(Public Service Commission, Second District, July 9, 1918)

A natural gas corporation cannot justify an increase of rates by showing a possible future income loss.

Where a natural gas company has in past years earned a fair return on the value of its property used in the public service, an increase in rates is not justified by a showing that the industrial use of gas will have to be suspended and that the income would thereby be diminished, where such industrial use appears not to have been actually suspended and the evidence shows merely a theoretical calculation of loss of income based on the assumption of such suspended sale for industrial purposes.

Justin V. Purcell, for complainant.

Thomas F. Rogers and Neile F. Towner, for respondent.

IRVINE, Commissioner.—The Crystal City Gas Company supplies natural gas in the city of Corning. Its rates for domestic consumers were in the past forty-five cents gross per 1,000 cubic feet, with a discount of five cents for prompt payment and a minimum charge of 1,000 cubic feet per month. A tariff was filed, effective March 1, 1918, increasing the price to fifty-eight cents gross, with a discount of five and one-half cents for prompt payment and a minimum charge of 2,000 cubic feet per month. The mayor of the city complained against the new rates as unreasonable. Hearings were had at which a large volume of testimony was taken, but decision has been withheld awaiting

an expected determination by the Appellate Division in another case involving the effect of a franchise limitation upon the authority of the Commission, the Corning franchise limiting the price to fifty cents per 1,000 cubic feet. The Appellate Division having adjourned for the summer recess without determining the case referred to, it has been deemed proper for the Commission to proceed and decide this case upon its merits.

We think the complaint must be sustained taking the evidence in the light most favorable to the company. The company introduced evidence tending to show a reproduction cost of fixed capital of \$170,536, with an estimated depreciation of 20 per cent, or a present value of \$144,429. This includes only the tangible fixed capital without allowing anything for organization, engineering, or other charges which should be taken into account. An allowance of 15 per cent of the reproduction cost would amount to \$27,080.40, which added to the depreciated value gives the sum of \$171,509. To this should be added current assets, \$46,391. The company claims deficiencies of return in its earlier years which with interest added amounts to \$64,373. Accepting these figures, we have a gross valuation of \$282,273. The income until 1915 ranged from about \$8,000 to \$21,000 per annum. In 1916 the income was \$23,759.52; in 1917 it was \$50,134.45. This is more than 17 per cent on the valuation assumed.

It is asserted that the high incomes for 1916 and 1917 were due to large sales for industrial purposes made to the Corning Glass Works and the Steuben Glass Works; that it has become necessary to cut off the supply of gas for industrial purposes, and with that source of revenue taken away the income in 1916 would have been only about \$8,200, and in 1917 about \$7,000, and that by applying the present rates to the 1917 domestic consumption the gross income would be \$16,893, which certainly would not be excessive.

The Crystal City Gas Company obtains its supply of gas from the Potter Gas Company, a Pennsylvania corporation, which delivers the gas to the Crystal City Company at the city line. There is evidence tending to prove that the Potter Company, on

account of the diminishing supply of gas, required the Crystal City Company to discontinue selling gas for industrial purposes. It is also claimed that the Federal Fuel Administration had also so ordered. The only support for the latter contention is found in a letter signed by the County Fuel Administrator, stating that the Fuel Administration under date of December thirteenth "issues a ruling that gas for domestic use takes precedence over that for manufacturing and other purposes." It appears that the company continued to supply gas for industrial purposes, except to the two glass works, which it was not supplying at the time of the hearing. In response to inquiries made since the hearing by the Commission to the company, the company informs the Commission that it supplied the Corning Glass Works in the month of May with 5,367,000 cubic feet of gas. It also appears that it proposes to supply gas to a foundry in the town of Corning, where the company also has a franchise. In these circumstances, rates should not be based upon a theoretical discontinuance of the sale of gas to industries. If such sale should actually be discontinued, and permanently, it may well be that the company would be entitled to an increase in rates to domestic consumers. Until such discontinuance actually takes effect, and experience demonstrates the necessity for an increase, no increase should be permitted.

On the hearing, the city amended its complaint by asserting that the old rates were too high. This would seem to be true on the basis of 1917 operations, but that year was the most profitable in the history of the company.

Taking a series of years as a guide, there is no evidence to show that the old rates, which seem to have been satisfactory while in force, are unreasonably high.

The company should be required to cancel its present tariffs and to restore the rates in effect prior to March 1, 1918.

All concur.

Petition of CENTRAL NEW YORK SOUTHERN RAILROAD CORPORATION under Section 89 of the Railroad Law for a Determination of How a Portion of its Railroad to be Constructed Shall Cross North Cayuga Street, in the Town of Ithaca, Tompkins County

Case No. 6466

(Public Service Commission, Second District, July 9, 1918)

Determination sought by a railroad company as to the manner in which it shall cross a public street in the town of Ithaca.

In constructing and operating a steam railroad proposed to be built between the city of Auburn and Ithaca a connection with the Delaware, Lackawanna and Western railroad was desired in the city of Ithaca. A single track extension is proposed beginning near the southerly terminus of the former New York, Auburn and Lansing railroad to a connection with the Auburn-Ithaca branch of the Lehigh Valley railroad which now has a connection with the Delaware, Lackawanna and Western. The petitioner operating over the Lehigh Valley tracks will extend its line by crossing at grade a highway in the town of Ithaca known as North Cayuga street. It appearing that swampy conditions make an under crossing impossible, and an overhead crossing being prohibitive on the ground of expense, ordered that the grade crossing at the point indicated be directed.

BY THE COMMISSION.—By an amendatory order dated July 14, 1914, in Case No. 4269, this Commission granted a certificate of public convenience and a necessity to the petitioning corporation under section 9 of the Railroad Law for the construction and operation of a steam railroad from a connection with the New York Central and Hudson River railroad in the city of Auburn to a connection with the Delaware, Lackawanna and Western railroad in the city of Ithaca. In order to make the last named connection, the petitioner proposes to construct a single-track extension of its railroad, beginning near the southerly terminus of the former New York, Auburn and Lansing railroad, thence approximately on the route originally planned to a connection with the Auburn and Ithaca branch of the Lehigh

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Valley railroad which in turn has physical connection with the Delaware, Lackawanna and Western. Petitioner will operate over the Lehigh Valley tracks. The proposed extension will cross a highway in the town of Ithaca known as North Cayuga street extended, and the petitioner has come before the Commission under section 89 of the Railroad Law for a determination as to the manner in which said crossing shall be made.

At a hearing upon said petition held in the city of Ithaca on June 22, 1918, there appeared Charles E. Hotchkiss for the petitioner; D. F. Van Vliet, Herman Bergholtz, and W. J. Bates for the Bergholtz Realty Company; and E. A. Dahmen for the State Department of Highways. Due proof of publication of the notice of the hearing was filed; and there was submitted in evidence a certified copy of the order of the Supreme Court dated the 8th day of January, 1918, under section 21 of the Railroad Law, permitting the petitioner to cross North Cayuga street extended in the town of Ithaca.

It is proposed to cross the highway at grade, the location of the crossing being about 950 feet southwesterly from the point where the petitioner's railroad crosses the Lake road on an overhead bridge, and about 2,400 feet north of the northerly corporation line of the city of Ithaca, the last mentioned distance being given incorrectly as 1,200 feet both in the petition and in the order of the Supreme Court, due to an error in making the scale on accompanying map. Due to the swampy condition of the surrounding land an under-crossing would be impossible; and an overhead crossing could only be made at an expense that would be prohibitive, especially during the period of war economy.

At the point of crossing, the proposed grade of railroad will be about two feet above the present grade of North Cayuga street, and the petitioning corporation proposes to raise the grade of the street to the level of the railroad with easy gradient on both north and south sides, to re-surface the street, and to surface the actual crossing with concrete between the rails and two feet outside thereof for a distance equal to the width of the roadway, all in a manner satisfactory to the superintendent of highways of

the town of Ithaca. It appears from testimony at the hearing that North Cayuga street north of the corporation line is at present but little used, as almost all of the traffic to and from the lake shore goes by way of the Lake road, an improved highway which runs approximately paralld to and about 500 feet east of North Cayuga street. The view both north and south of the proposed crossing is practically unobstructed. Upon consideration, it is determined that it is impracticable for the proposed crossing to be made otherwise than at grade, and it is therefore

Ordered: That the said single-track extension of the petitioner's railroad shall cross North Cayuga street, in the town of Ithaca, at grade; and that the surface of the highway shall be raised to the proposed level of the railroad; all work in connection therewith to be done in a manner satisfactory to the superintendent of highways of the Town of Ithaca, and all at the expense of the Central New York Southern Railroad Corporation.

In the Matter of the Complaint of the TOWN OF HARMONY,
Chautauqua County, against ERIE RAILROAD COMPANY as to
Repair of Certain Bridges Carrying Highways over Its
Railroad

Case No. 6432

(Public Service Commission, Second District, July 11, 1918)

The Public Service Commission has no authority to determine a grade crossing question where no claim is made that it is necessary on the ground of public safety.

An order was made on October 30, 1906, by the then Board of Railroad Commissioners, determining the manner in which the Nypano railroad (now the Erie railroad, respondent herein) should cross two certain highways in Chautauqua county. Under the order above mentioned two bridges were called for, but in this proceeding it is alleged that the railroad company, in each instance, neglected to conform to the requirements of the said order and that it did not construct the steel bridge in all of its parts in that it did not place steel stringers or joists to support the flooring but used wooden stringers or joists, and that they have now become decayed and have not sufficient strength to support a new floor;

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that the complainants desire to lay such floor but that the railroad company has refused to replace or repair the said joists.

Held, that the joists must be considered a part of the roadway and not a part of the framework of the bridge in the case of each of the two structures, and the complainant, the municipality, was liable for its maintenance.

Held, also, that the matter of grade crossing elimination having been once considered by the old Board of Railroad Commissioners in this case, and the complainant having failed to allege or claim that public safety requires the alteration asked for, the petition herein cannot be entertained.

Ottoway & Munson, of counsel; C. Abbott, Highway Commissioner; and A. L. Richardson, Justice of the Peace, for the Town of Harmony, complainant.

M. B. Pierce, for respondent.

HILL, Chairman.—On October 30, 1906, an order was made by the then Board of Railroad Commissioners, pursuant to the then section 60 of the Railroad Law, determining the manner in which the Nypano Railroad (now the Erie Railroad, respondent herein) should cross two certain highways in Chautauqua county, as follows:

“Exhibit E, town of Harmony: Highway from Watts Flats to Blockville, at station 820 plus 58.9 of center line of changed route of Nypano railroad.

“The highway on its present line shall be carried over the railroad on a steel bridge at a point shown on a plan dated June 28, 1906, and marked Exhibit E, now on file with this Board in this matter. This plan has been changed since it was first drawn, the change being shown thereon, but it is not marked ‘alternate plan.’ The bridge shall be eighteen feet wide between guard-rails. The bridge shall have a wooden floor. The clearance of the bridge above top of rail of the railroad shall be twenty-two feet. The maximum grade on the approaches to the bridge shall be 8 per cent. The roadbed of the approaches to the bridge shall be twenty-four feet wide and shall have guard-rails where the embankment is higher than three feet. The representatives of the town

expressed themselves at this hearing as satisfied with this proposed over-crossing as thus proposed to be constructed.

"Exhibit A, town of Harmony: Highway from Grants to Lottsville, at station 636 plus 40 of center line of said branch connection or cut-off.

"The highway shall be changed in location and shall be carried over the railroad at a point shown on a plan dated April 20, 1906, and marked Exhibit A, now on file with this Board in this matter, on a steel bridge sixteen feet wide between guard-rails, which guard-rails shall be of planking two feet high, the bridge to have a clearance of twenty-two feet above top of rail of the railroad. The bridge shall have a wooden floor. The maximum grade on the approaches to the bridge shall be 8 per cent. The roadbed of the approaches to the bridge shall be twenty-four feet wide and shall have guard-rails where the embankment is higher than three feet. A piece of existing highway shall be abandoned and a new piece of highway shall be constructed in accordance with said plan, Exhibit A, dated April 20, 1906. The representatives of the town expressed themselves at this hearing as satisfied with this proposed over-crossing as thus proposed to be constructed."

Following the granting of the said order, the bridges in question were constructed upon plans which called for a steel framework resting on stone abutments, with steel girders, one on each side, running lengthwise of the bridge, to which were riveted steel cross-beams running transversely to the girders about fourteen feet apart. This construction comprised the steel framework of the bridges, but in order to furnish the bridges with floors so as to permit them to be used for traffic, wooden joists three by twelve inches were laid from cross-beam to cross-beam parallel with the side girders, and a three-inch plank surface, the planks running from side to side of the bridge, were laid on top of the joists. This construction was in conformity with the plans which were made for the bridges and approved by the Railroad Commissioners. The two bridges were completed in the winter of 1906-1907. On March 14, 1908, the highway commissioners of the town of Harmony formally petitioned the Public Service Commission (which

had succeeded to the powers and duties of the Board of Railroad Commissioners) that the order of the Board of Railroad Commissioners be modified so as to read "that the highway shall be carried over the railroad on a steel bridge with steel eye-beams or stringers and that the floor shall be of cement, and that the maximum grade on the approaches to the bridge shall be five per cent." Upon hearing, and on respondent's motion, this proceeding was discontinued without any modification of the order being made. In May, 1911, the Commission, after inspection, adopted a resolution approving the completed work.

The complaint or petition in this proceeding, after setting forth the provisions of the original order, alleges that in each instance the railroad company neglected to construct a steel bridge in all its parts, in that it did not place steel stringers or joists to support the wooden floor provided for by the said order, and that in place thereof the said railroad company constructed the said bridge with wooden stringers or joists, and in that particular it did not comply with the said order.

Inasmuch as the bridges were constructed in accordance with the plans adopted by the Board of Railroad Commissioners, and the construction was approved by the Board after their completion, it is difficult to discover any hypothesis upon which the said order can be opened and its conditions changed. We must therefore assume that the bridges were constructed in all respects in conformity with the orders which authorized, directed, and approved their construction.

The complaint further alleges in each instance "that the said wooden joists have become so decayed and rotten that they are not of sufficient strength to take a new floor over the said bridge, that the petitioner desires at once to construct a new roadway over the said bridge, that the said railroad company has declined and refused to replace or repair the said joists, and that the complainant should not in justice and right under law or equity be put to the expense of replacing said joists."

The truth of this allegation, so far as the facts are concerned, is admitted by the respondent, and squarely presents the question

whether the wooden joists are a part of the "framework," or on the contrary form a part of the "roadway," of the bridge within the meaning of section 93 of the Railroad Law, which provides that "when the highway crosses a railroad by an overhead bridge the framework of the bridge and its abutments shall be maintained and kept in order by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality."

There is very little authority to be found bearing upon the question in dispute, but such as we find would seem to bear out the respondent's contention. While dictionary definitions are never controlling in statutory construction, they are entitled to some weight as bearing upon the meaning of words which are made use of in statutes. The dictionary definitions of frame and framework all seem to be in substantial agreement that a frame or framework defines the supporting or enclosing frame which is used as the basis for a more complete structure, or as those parts which may be called the skeleton in the sense that the bones are the frame of the body. Other definitions refer to the framework as the constitution, the system; also as the sustaining parts of a structure fitted and joined together.

The complainant cites the case of *Sullivan v. Boston & Albany Railroad*, Sup. Jud. Ct. Mass., Suffolk, Nov. 6, 1911, 96 N. E. Repr. 347, where the statute provided that the framework of the bridge and its abutments "shall be maintained and kept in repair by the railroad corporation, and the *surface* of the bridge and its approaches shall be maintained and kept in repair by the city or town." This statute is in substance the counterpart of the New York statute except that the word "surface" is used where our statute contains the word "roadway." In the Massachusetts case, the roadway of the bridge consisted of three inches of hardwood planking laid on the steel framework, covered by a surface of two-inch pine planks, which became the wearing surface for traffic; the court held that the word surface as used in that statute applied to both layers of planking. This case I consider very strong authority against the complainant's proposition, because it would

seem entirely fair to compare the three-inch hardwood planking supporting the two-inch wearing surface plank, with the wooden joists which support the surface planks in the case under consideration. The word roadway is certainly more comprehensive than the word surface. In every roadway constructed with any degree of thoroughness there will always be found a supporting structure below the surface and invisible to the eye. This is true for instance of granolithic walks, of asphalt pavements, stone pavements, brick pavements, and macadam pavements. While the question may not be free from doubt, I am inclined to hold that the joists must be considered a part of the roadway and not a part of the framework of the bridge; and as the construction is substantially similar in both bridges, the same conclusion applies to both.

The complaint further alleges that the complainant "is desirous of making an improvement of the roadway over and across the two said bridges by constructing a concrete floor in place of a wood floor or roadway, and is desirous that the said railroad company should replace the joists of a sufficient strength and manner to carry a concrete roadway over said bridges;" and a part of the prayer for relief is for an order directing the railroad company to repair immediately the framework of said bridges with new joists of steel, and of sufficient strength and so constructed and placed as to carry a new concrete floor.

We can find no authority in the statutes for the making of such an order by the Commission. A grade crossing elimination structure which has already been completed under the statute in question can be altered by the Public Service Commission only where a petition is presented to it alleging that public safety requires the alteration, or where the Commission proceeds of its own motion on the opinion of the Commission itself that public safety requires such an alteration. The former procedure is prescribed by section 91 of the Railroad Law, and the latter procedure by section 95. Inasmuch as the complaint fails to allege, and it is not claimed as a fact, that public safety requires the alteration, the petition cannot be entertained as having been made under section 91, and the complainant does not claim to be proceeding

under that section. As that section contains the only provision of authority to the Commission to order the alteration of a completed structure on a complaint of the town authorities, it follows that the complaint must be dismissed.

All concur.

Joint Petition of the COUNCIL OF THE CITY OF NEWBURGH and THE NEW YORK CENTRAL RAILROAD COMPANY under Section 91 of the Railroad Law for an Alteration in the Manner in which South Street Crosses the Tracks of the West Shore Railroad (Leased to and Operated by The New York Central Railroad Company) in the City of Newburgh

Case No. 6339

(Public Service Commission, Second District, July 23, 1918)

Application of the city of Newburgh and the New York Central Railroad Company for permission to eliminate a grade crossing in said city.

The crossing for pedestrians on South street in the city of Newburgh, where the street line intersects the West Shore railroad at grade, having been found dangerous, the city and the railroad have united in a petition for leave to eliminate such crossing and to construct a subway for pedestrians in place thereof, no part of the work to be charged to the State. The city and the railroad have entered into an agreement with each other as to the cost and how the same is to be chargeable to the respective parties. Permission given and agreement approved with the understanding that on June 25, 1918, Hon. R. S. Lovett, National Director of the Division of Capital Expenditures, approved the application of the New York Central Railroad Company for its share of the expense of this elimination which amounts to \$14,000. Petition granted with the usual restrictions.

BY THE COMMISSION.—South street, an east and west thoroughfare in the city of Newburgh, terminating at the Hudson river, crosses at grade the two main line tracks of the West Shore railroad, located near the river bank. Largely by reason of the tortuous westerly approach and steep grades, the use of the crossing (now protected by gates and flagmen) by vehicles is negligible.

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A great many pedestrians, however, cross the tracks at this point. Especially is this true during the period when river transportation is carried on. On account of the dangerous crossing claimed to exist at this locality, the city of Newburgh and the New York Central Railroad Company (lessee of the West Shore railroad) have come to the Commission with a joint petition under section 91 of the Railroad Law, asking that the grade crossing be eliminated and that a subway for pedestrians only be constructed. It is proposed by the petitioners to apportion the entire cost of the project among themselves and to charge no part thereof upon the State, and for that reason they have entered into an agreement with each other specifying the portions of work, the cost of which is to be chargeable to the respective parties.

Upon this petition a hearing after public notice as required by the statute duly given was held at Newburgh on March 22, 1918, due proof of publication of such notices and of personal service thereof upon property owners being of record. Jonathan D. Wilson, Henry Wilson, W. R. Perkins, B. E. Guernsey, John L. Sloan, R. W. Spencer, and John B. Corwin appeared for the city of Newburgh. William F. Cassedy and B. S. Voorhees appeared for the New York Central Railroad Company.

This hearing developed no opposition to the proposed elimination. A plan is submitted which is favored by both the railroad company and the city. It also appears that a recreation pier has recently been erected by the city near the foot of South street, that this pier is used as a landing for many boats, and that the most direct route to the trolley line and to the business section of the city leads directly from this pier over the South street crossing.

Applicant's Exhibit No. 5, being a record of traffic on March 18, 19, and 20, 1918, when transportation on the river was not carried on, showed an average number of pedestrians of 216 for each day, crossing between the hours of 6 A. M. and 7 P. M. No vehicles and only one auto were reported as having crossed on any of these days, and the average number of train movements was forty-four, of which an average of fourteen was passenger

trains. The record further shows that all of the vehicular traffic in this vicinity bound toward the river crosses the tracks at Fifth street (the next street south), and that during the excursion season thousands of pedestrians use the South street crossing.

The expense of this improvement has been estimated at about \$12,000.

After due consideration the Commission has finally determined that the petition should be granted, and it is therefore,

Ordered: 1. That the South street grade crossing of the West Shore railroad in the city of Newburgh shall be closed and discontinued, and travel diverted therefrom to the existing crossing at Fifth street and to an undergrade crossing, with approaches thereto, for pedestrians only, to be constructed within the existing limits of South street, all substantially as shown upon a print on file with this Commission, entitled:

"West Shore R. R., Leased and operated by N. Y. C. R. R. Co. Buffalo and East River Division. Proposed E. G. C. South street at Newburgh. Issue No. A. New York, Aug. 22, 1917."

The subway shall be at least seven feet wide and at least seven feet, six inches in height, thoroughly waterproofed and drained if necessary; the length of the barrel to be such as to permit of the laying of an additional track by the railroad company. The westerly approach shall consist of stairways, one flight commencing at the westerly portal of the subway and running parallel to the axis of the barrel to a landing about seven feet above the subway floor; the other flight beginning at a landing at this point with a direction at right angles to the subway, ascending a height of about thirteen feet, from which point there shall be a concrete ramp on about a $7\frac{1}{2}$ per cent grade, which shall be carried to an intersection with the present easterly sidewalk at Water street. On the east side the approach shall consist of a ramp on about a 2 per cent grade, descending from the easterly portal toward the water front a distance of approximately one hundred feet to an intersection with the present ground surface. This ramp shall be paved or otherwise improved, as may be determined by the city of Newburgh. Provision for concealed electric light wiring and

suitable number of outlets shall be made; no part of the cost of wiring, boxes, lights, and connection to existing light circuit, the maintenance of such lighting facilities, or the cost of lighting shall, however, be a charge upon the railroad corporation.

2. That in accordance with an agreement entered into by and between the petitioners herein, the New York Central Railroad Company shall construct at its own expense the pedestrian subway under its tracks, including in addition to all of the work embraced between the portals, the easterly wing walls and the first flight of the stairways at the westerly approach together with the retaining walls on either side thereof, to a line, marked "A B" on the plan herein referred to, and that the city of Newburgh shall construct at its own expense the easterly approach and all the remaining portion of the westerly approach lying between the above mentioned line "A B" and Water street.

It is understood and hereby further determined that the entire subway, the wing walls on the easterly end, and the retaining walls on the westerly end for a distance of about fourteen feet from the westerly portal shall be considered as that portion of the structure which, under section 93 of the Railroad Law, shall be maintained and kept in repair by the railroad company, and the maintenance of all other walls together with all stairways and walks as herein provided shall under the same section be considered as an obligation of the city of Newburgh.

In pursuance of the agreement set forth in the petition herein, the New York Central Railroad Company and the city of Newburgh shall assume, pay and discharge the entire cost and expense of acquiring the necessary ends to carry out the improvement herein provided for, including the costs of any rights or easements necessary or required for the purpose of carrying out the provisions of this order and of any land or other damages whatsoever which may arise by virtue thereof. This order being granted upon the express condition that no financial liability or obligation whatsoever shall attach to or fall upon the State of New York on account of the acquisition of lands, rights, or easements necessary or required, construction work, or any other

expenses whatsoever incidental to carrying out the provisions of this order, the acceptance of which by the New York Central Railroad Company and the city of Newburgh shall be deemed as an undertaking on their part to save the State of New York and this Commission harmless from all costs, expenses, claims, or demands whatsoever on account of this order and of any of the provisions thereof.

This order is made with the understanding that on June 25, 1918, Hon. R. S. Lovett, National Director of the Division of Capital Expenditures, approved the application of the New York Central Railroad Company for its share of the expense of this elimination which amounts to \$14,000.

Petition of THE FISHKILL ELECTRIC RAILWAY COMPANY under Subdivision 1, Section 49, Public Service Commissions Law, for Permission to Increase Passenger Fares

Case No. 6079

(Public Service Commission, Second District, July 25, 1918)

Application of a transportation corporation for permission to increase passenger rates.

The petitioning corporation, the Fishkill Electric Railway Company, alleges that the rates, fares and charges now in existence are insufficient to yield a reasonable compensation for the service required, are unjustly low, and do not allow a reasonable average return upon the value of the property actually used in the public service, after providing for surplus and contingencies. The municipal authorities of the city of Beacon have written the Commission that they have no protest to make in the matter but will leave it entirely to the judgment of the Commission. The petitioner's railroad extends from the New York Central depot in the said city to the village of Fishkill, with a branch extending to the foot of Mt. Beacon. It has two fare zones at five cents each, the first comprising the city and extending from thence some three miles to Glenham, and the other the balance of the road, about six miles. A six cent fare in each of these zones is asked for. Upon investigation, *held*, that the increase asked for would not permit any dividends to stockholders and should be granted, as it would afford temporary relief and permit the road to continue to serve the public in these abnormal times, and when

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business conditions have adjusted themselves another effort might be made to rearrange the fare schedule more in accordance with the principle of reasonable average return on the value of the property actually used in the public service and the necessity of making a reservation out of income for surplus and contingencies.

James G. Meyer, attorney, and J. T. Smith, president, for the petitioner.

CHENEY, Commissioner.—The petition in this case, which is in the nature of a complaint, alleges that the rates, fares, and charges charged by the petitioner are insufficient to yield a reasonable compensation for the service rendered, and are unjustly and unreasonably low, and do not allow a reasonable average return upon the value of the property actually used in the public service after providing for surplus and contingencies; and asks that notwithstanding section 181 of the Railroad Law, the Commission determine the just and reasonable rates, fares, and charges to be observed and in force, and permit an increase in the rate of fare charged by the petitioner in the cities and incorporated villages in which it operates, from five cents to six cents. It appears that there are no conditions in any of the municipal consents under which the company operates, fixing the rate of fare it may charge, or limiting the power of this Commission to fix reasonable rates of fare notwithstanding the provisions of section 181 of the Railroad Law. No opposition to the application was presented at the hearing, and the municipal authorities of the city of Beacon have written the Commission that they have no protest to make in the matter but leave it entirely to the judgment of the Commission.

The petitioner operates an electric railroad from the New York Central depot in the city of Beacon to the village of Fishkill, with a branch extending to the foot of Mount Beacon. The road is operated with two fare zones at five cents each; the first comprising the city of Beacon and extending toward Fishkill about three miles to the Glenham switch, and the other the balance of the road, about six miles. It is proposed to increase the fare in each of these zones to six cents. The portion of the road extend-

ing from the railroad station in Beacon to the foot of Mount Beacon and a large portion of the equipment are the property of the Citizens Railroad, Light and Power Company, and are operated by the petitioner under a lease at an annual rental.

It appears that the total revenue of the road for the year 1917 was \$57,331.15, the total operating expenses \$46,818.74, and taxes \$2,091.45, leaving a balance of \$8,420.96 applicable to return on invested capital. The interest on the bonded debt amounted to \$3,000, other interest \$27.01, and the rental paid under the lease to the Citizens Railroad, Light and Power Company \$9,000, leaving an actual deficit in operation for the year of \$3,606.05. In arriving at these figures there was charged to operation for depreciation reserve only the sum of \$3,639.67, a sum which in the opinion of the Commission is much too small and much less than the sums recommended by the Commission in its uniform system of accounts for street railroad corporations. The company submits figures of its income account for the year 1917 in which the charge for depreciation reserve, or amortization as it terms it, is placed at \$8,196.19, instead of \$3,639.67, the sum actually appearing on the books. This "corrected figure," as it is termed, is arrived at by computing the reserve on the different items of depreciable property according to the percentage of their probable life, details of which are given, resulting in an average of 3.07 per cent of the cost of such property, a method which it claims corresponds with that recommended by the Commission. Computed on this basis, the sum applicable to capital return, including fixed charges, is \$3,864.44, and a net corporate loss, after the payment of interest and rental under the lease, of \$8,162.57 is shown. The books of the corporation show a net corporate income over operating expenses for a ten year period ended December 31, 1917, of but \$8,468.36, and in none of these years have the amounts charged to the depreciation reserve been adequate. These figures, when tested by any of the rules which form the basis of rate making, demonstrate that the present rates are inadequate and that the petitioner is entitled to an increase in rates.

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No valuation of the property of either of these companies was ever made by or under the direction of this Commission. Petitioner presents here an appraisal of the property and equipment operated by it, made in 1915 by an engineer in the employ of J. G. White & Co. and the manager of the Poughkeepsie and Wappingers Falls Railway Company, which makes the value of the total physical property \$259,044, non-physical expenditures during construction \$38,856.60, or a total construction value of \$297,900.60. The proof of the actual expenditure for capital items since that time as shown by the books of the company brings the total capital balance at the beginning of 1917 to \$303,868.88, and at the end of the year \$315,329.91, or an average of \$309,599 for the year. These figures do not coincide with the capital items contained in the company's books or the annual reports on file with this Commission, but it is evident from an examination that the figures contained in the books and reports are practically only nominal. As a comparison of the amounts stated in this appraisal with similar amounts in reports of other electric railroads of substantially similar mileage and equipment on file with the Commission does not show any great inequalities, it is fair to assume that the appraisal is a fair statement of the value of the property used by the petitioner in furnishing service, no allowance being made therein for organization expenses or other intangibles which might properly be taken into consideration.

Claim is also made for an allowance for working capital, but for the reason that the accounts of this company are so mixed with those of the Citizens Railroad, Light and Power Company, and no effort was made to separate them, the evidence offered is purely an estimate; and as the results of operation and the probable effect upon the revenue of the increase asked for show that an adequate return in all probability will not be realized upon the capital invested as computed above, it is hardly worth while to follow this inquiry further.

The same may also be said of the claim for deferred return on investment. It appears that practically no dividends have been paid to the stockholders of this road since its inception, and no

return of any kind has been made upon the capital invested except the interest which has been paid upon the bonded indebtedness, which is only \$50,000, and the rental of \$9,000 per year under the Citizens Railroad, Light and Power Company's lease. Computations have been presented covering the last ten years' operations based upon 8 per cent return upon the value of the physical property adjusted from the books to the appraisal made in 1915 plus the working capital as estimated, which show an accumulated deficiency in return for that period of \$144,857.93, and we are asked to include that item as "going cost" in fixing the valuation of the property for rate purposes. We do not consider it necessary to decide that question in order to determine the present application, and will leave it open for consideration should occasion arise in the future when the abnormal conditions under which the road is now being operated shall have ceased to exist.

It is evident that if this proposed increase is granted the probable income to be realized from the operation of the road will not be such as to provide an undue return upon the capital invested as computed above. Certain computations of future income have been made by the Commission's accounting department upon the basis of several assumptions. While these are estimates only, as must necessarily be the case with regard to probable future operations, they are worthy of consideration. Upon the assumption that the traffic and the operating expenses and taxes remain unchanged from those of 1917, there would be produced a gross income available for return on invested capital of \$14,757.43, which would give a rate of return of 4.8 per cent upon the estimated cost of physical property, not including working capital. If the other items of capital account claimed by the petitioner were taken into consideration, the rate of return would be correspondingly decreased.

It has been shown by the experience of other companies where rate increases have been granted that there is to some extent a falling off in traffic and that the gross income derived is less than the proportionate increase in rate. It also appears that the expense of operation of this company has increased and will, in

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all probability, still further increase on account of higher prices for labor and all materials necessary for operation. Assuming a 5 per cent decrease in traffic and a 10 per cent increase in operating expenses, the amount available for capital return would be \$6,098.90, and the rate of return on the same estimate of capital 2 per cent. Further decreases in traffic and increases in operating expenses still further decrease the rate of return until it would soon reach the vanishing point which would mean a deficiency in operating expenses and ultimate bankruptcy.

While the increase of fare asked for will probably not permit of any dividends to stockholders, it should be granted, and although the method by which the determination is arrived at can hardly be said to be strictly scientific, it will probably afford temporary relief and permit this road to continue to serve the public in these abnormal times, and, when business conditions have adjusted themselves, another effort might be made to rearrange the fare schedule more in accordance with the principle of "a reasonable average return on the value of the property actually used in the public service and the necessity of making reservation out of income for surplus and contingencies."

All concur except Commissioner Barhite, not present.

In the Matter of the Petition of EDWARD F. BRUSH, as MAYOR OF THE CITY OF MOUNT VERNON, under Section 90, Railroad Law, for a Determination of how Bronx Street shall Cross the New York and Harlem Railroad (Leased to and Operated by The New York Central Railroad Company)

Case No. 6463

(Public Service Commission, Second District, July 30, 1918)

Application in behalf of the city of Mount Vernon and the New York Central Railroad Company as to the elimination of a grade crossing in said city.

A swimming pool, athletic field and baseball ground have been established on that portion of the property of the Bronx Parkway Commission lying west of the tracks of the said railroad in the vicinity of Bronx

street. Pedestrians have been accustomed to cross the said tracks at other than public crossings, as such public crossings are located at considerable distances from the said street. This has proved dangerous not only because of the operation of trains but also because of the existence of a third rail located adjacent to the main running rails of each track. To eliminate this dangerous situation the city and the railroad have agreed that an overhead bridge shall be constructed over said tracks and the city of Mount Vernon has extended Bronx street across the tracks of the Harlem division of the said railroad. *Held*, that the permission sought should be granted with the proviso that the staircase should be carried down to the property of the Bronx Parkway Commission, and that the necessary easement or other right to make such construction should be secured from the Bronx Parkway Commission.

BY THE COMMISSION.—The Bronx Parkway Commission has established a swimming pool, an athletic field, and baseball ground on a portion of its property lying west of the tracks of the Harlem division of the New York Central Railroad Company in the vicinity of Bronx street, city of Mount Vernon. Residents of that portion of Mount Vernon lying east of the aforesaid tracks have been accustomed to cross said tracks at other than public crossings, such public crossings being located at considerable distances north and south of the said Bronx street. This has been a source of great danger not only because of the trains operating on said tracks but also because the motive power on this portion of the railroad is chiefly electricity derived from a third rail located adjacent to the main running rails of each track.

To eliminate this dangerous situation, the city of Mount Vernon and the New York Central Railroad Company have agreed that an overhead foot bridge shall be constructed over said tracks, and the city of Mount Vernon has therefore, by resolution of its common council passed May 18, 1918, approved by its mayor on May 20, 1918, extended Bronx street across the tracks of the Harlem division of the New York Central railroad, due and proper notice of which proceeding was given to said railroad company.

The mayor of the city of Mount Vernon by petition dated May 28, 1918, has asked for a determination under the provisions of section 90 of the Railroad Law as to the manner in which said

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extension of Bronx street shall cross the tracks of the New York Central Railroad Company.

A hearing on said petition was held July 8, 1918, at which the following appeared: Alonzo C. Lowenstein for the city of Mount Vernon; George H. Walker and H. M. Bassett for the New York Central Railroad Company; L. G. Holleran for the Bronx Parkway Commission; and R. J. Secor, alderman, and chairman of the committee on railroads and bridges of the common council of the city of Mount Vernon. Due proof of publication of notice of the hearing and of personal service of notice on all parties interested, and a certified copy of the resolution of the common council of the city of Mount Vernon extending Bronx street were filed.

A plan of a proposed overhead foot bridge was submitted in evidence and marked "Petitioner's Exhibit No. 2." This plan shows a stairway leading down from the westerly end of the bridge to the property of the Bronx Parkway Commission, a portion thereof being within the property of said Commission. It was deemed best to so design this stairway, since if it were carried down wholly within the property of the New York Central railroad it would be directly under a high tension transmission line of said railroad company, which would introduce an element of great danger. It is therefore believed that the wisest and safest plan is to carry this stairway down to the property of the Bronx Parkway Commission as heretofore mentioned, and that the necessary easement or other right to make such construction should be secured from the Bronx Parkway Commission. An under-crossing at this point is not considered on account of the excessive cost of construction.

After due deliberation, it is determined that an overhead crossing shall be made, and it is therefore,

Ordered: 1. That Bronx street as extended shall cross the tracks of the Harlem division of the New York Central Railroad Company by means of an overhead bridge; that for the present, construction shall be limited to a structure for pedestrians only, and in accordance with a plan filed with this Commission, entitled:

"Proposed Foot Bridge, Bronx Street, Mt. Vernon. Office of Engineer of Structures, September 7, 1917;" that the bridge shall have a clear span of about one hundred and seventy-one feet, divided into three parts by steel supporting columns; that the minimum clear head room above the top rail of the tracks shall be twenty-two feet; that the framework of the bridge shall be of steel, and the flooring of wood; that the abutments and supporting columns shall be of steel carried on foundations of concrete; that the approach stairways shall be of wood; that the roadway on the bridge, and the approach stairways shall have a minimum clear width of six feet, and that they shall be protected on both sides by proper railings; that the easterly approach shall consist of two stairways projecting north and south at right angles to the axis of the bridge; that the westerly approach shall consist of a single stairway on a continuation of the axis of the bridge, extending on to the property of the Bronx Parkway Commission; that any other work not specifically herein mentioned which may be necessary to carry out the intent and purpose of this determination shall be included in the cost properly chargeable to this project.

2. That in accordance with section 94 of the Railroad Law the cost of the work herein ordered and provided for, including the cost of all lands, rights, and easements necessary or required, and of any land or other damages whatsoever which may arise by virtue thereof, and any and all costs of construction and expenses incidental thereto, shall be properly chargeable to the project, and shall be payable as follows: 50 per cent by the New York Central Railroad Company and 50 per cent by the city of Mount Vernon; that no financial obligation whatsoever shall attach to or fall upon the State of New York on account of this project; that the easement or other right necessary to permit the construction of the westerly approach of the bridge as hereinbefore ordered shall be secured from the Bronx Parkway Commission by the city of Mount Vernon before any work of construction is commenced.

In the Matter of the Complaint of THE H. H. FRANKLIN MANUFACTURING COMPANY of Syracuse against NEW YORK TELEPHONE COMPANY as to Certain Charges for Telephone Service

Case No. 6407

(Public Service Commission, Second District, August 8, 1918)

Such regulations as will enable telephone companies to render reasonable and efficient service to the public should be allowed.

Telephone companies should be allowed reasonable latitude to adopt and enforce such regulations as will permit them to render reasonable and efficient service to the public generally.

The fact that a certain form of service and equipment has been in use, which is satisfactory to certain subscribers who object to a change, should not be allowed to prevent the company making a change and discontinuing such service and equipment where it is convinced in the exercise of good judgment and ordinary business foresight that different equipment and different form of service will enable it to render more efficient service to the general public.

The foregoing rule applied in the determination of the complaint against a change in practice and equipment regulating night service to private branch exchange subscribers. Appeal dismissed.

Decker, Smith & Curtis (by Mr. Decker and Mr. Smith), for complainant.

Paul H. Burns, for respondent.

CHENEY, Commissioner.— This complaint was filed against a change in practice of the New York Telephone Company in regard to night service and night listings in the telephone directory of the private branch exchange maintained by complainant at its manufacturing plant at Syracuse, and incidentally it involved a complaint against the rates charged for such service, according to the schedule of tariffs in force and on file with the Commission.

The New York Telephone Company is the Bell Company operating in the State of New York, its territory including the whole State and a part of New Jersey. It was formed by the consolidation of a number of different companies operating in differ-

ent parts of the State, the company operating the Syracuse territory being the Central New York Telephone and Telegraph Company. The complainant is a large manufacturing concern whose telephone service was first furnished by the Central New York Company, and after the consolidation the service was continued by the New York Company. The equipment used by complainant consists of a private branch exchange, consisting of a switchboard connected with the central office by five trunk lines, and numerous extensions from the branch exchange switchboard to various parts of complainant's establishment. This private branch exchange was attended by an operator employed by complainant, who was on duty from 7:45 A. M. to 5:30 P. M., and during the balance of the time the switchboard was unattended. In order to permit of night service it was the practice of complainants' operator before leaving at night to connect certain of the extensions with the different trunks, corresponding with the listings as given below, the effect being that such extension with its connecting trunk could be operated as a single telephone, all other extensions being out of service. Complainant had a listing in the directory of the Central New York Company as follows:

Franklin Mfg. Co., The H. H., 302 S. Geddes.... Warren 2540
 Note: Week days after 5 P. M., Sundays, and
 holidays call by individual number.

Main office	Warren 2540
Repair shop	Warren 2541
Shipping room and engine room.....	Warren 2542
Watchman's lodge	Warren 2543

The subscriber's listing in a telephone directory corresponds with the hole or position on the switchboard in the central office, which constitutes the termination of the wire leading to the subscriber's telephone, and when a call comes in, the number is the distinguishing feature which enables the switchboard operator to complete the connection desired. When a private branch exchange subscriber has more than one trunk line, each one terminates in a numbered hole on the switchboard, but only one of the numbers

is listed in the directory. In order to assure accuracy of operation it is desirable that these trunks end in consecutively numbered holes, but owing to the fact that subscribers take on additional trunks from time to time as the exigencies of their business demand, this is not always possible, as the consecutively numbered holes may be already in use for other subscribers when so required. For the same reason it frequently happens that the listed number is not the first of the consecutive numbers. For the information of the operator the different trunks of a subscriber are indicated by a connecting line, either white or red, underlining the respective holes. As the object of the additional trunks is to permit more than one call to be completed at the same time, the evidence is that the method of handling calls, according to the instructions and practice now and always in use by the New York Company, is that when a call comes in, the operator shall test the number called, and if that line is not in use complete the call upon that line; if the called line is found to be busy the operator will test the remaining lines of the series, as indicated by the underlining, until one is found which is not busy, and complete the call in that; if all are found busy the operator so reports.

The company claims, and there is no evidence to the contrary, that when it took over the Central New York Company it found in use there the form of directory listing for night service above mentioned, which was not used in other places in its territory, and which in the opinion of its engineers and executives was not a desirable practice, one which in effect was an undertaking on the part of the company to give a service which was beyond its power, and which resulted in confusion in operation and dissatisfaction on the part of its subscribers. The company took up the study of this problem among many others affecting the quality of service rendered, and worked out a plan for night service on private branch exchange systems, which is contained in its schedule of tariffs now on file with the Commission, and which is now in force in this State. The plan was not perfected all at once, the first tariff being filed March 1, 1915, and successive sup-

plements containing changes December 31, 1915, September 1, 1916, and October 2, 1916, the two latter being the ones in force at the time of filing this complaint. The tariff contains two optional plans available to the complainant. Plan No. 1 provides for handling incoming calls at night on the same basis as during the day. Under this plan each extension station which is to receive night service will be connected with a specified trunk at the private branch exchange switchboard, but only one trunk line in the same underlined series will be listed in the directory. This would give precisely the same service as the complainant had under the old system, except the added directory listings, and at no extra expense. The reasons assigned by the company for the withholding of the privilege of extra listings are two. One, that the publishing of the night listings (which would be the different departments with the consecutive numbers of the trunks in the series with which they are connected) would be in effect a representation by the company that it would connect the caller with the particular department desired and no other, a promise which it could not perform, because on account of the large number of private branch exchanges in its different systems, especially in the large cities, and the irregularity of the hours during which they are attended, it would be humanly impossible for the central office operators to remember when to follow one system or another in answering calls from each, rendering it necessary that but one method, and that the day method, should be used. The other reason is that experience has shown that when extra listings are permitted subscribers take advantage and use the directory as an advertising medium by requiring large numbers of unnecessary extra listings, thereby increasing the bulk of the directory, especially in the large cities. The company claims that the object of a telephone directory is to furnish a list of subscribers for use in obtaining connections, and that all unnecessary matter should be eliminated therefrom, and its use for advertising purposes, even if compensated, is entirely unwarranted. This first plan is the one chosen by about 80 per cent of the private branch exchange subscribers.

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The other plan was designed to fill the want which experience has shown exists in comparatively few cases of a sure night service advertised to all users. This plan is stated in the filed tariff in these words: "Under this form of service a trunk which is connected through an extension at night may be bridged to a multiple jack bearing a different (non-consecutive) number. The regular number in the underlined series may then be used for day service, and the special (non-consecutive) number for night service, and so shown in the directory. In this way a call made at night for the special number will be completed only by the specific trunk to which it is bridged; if that trunk is busy, or does not answer, the calling party will be so informed, instead of being connected with some other trunk in the service." That means that each trunk so bridged has two termini on the switchboard, one in the underlined series and another with a non-consecutive number. During day operation the series terminus is used, and at night the other one; the effect being that the trunk, properly connected with the proper extension in the subscriber's series, and the non-consecutive terminus on the central switchboard, which has a listing in the directory, are operated precisely as a separate telephone for night service. For this special service an additional rate is charged.

It appears that some time after the perfection of the new plan and the filing of the tariff regulating it, the company took up the matter of re-adjusting the private branch exchange business in Syracuse with the new plan and schedule. It then had nineteen such subscribers. Seven have changed to the multiple jack system provided by plan 2, and four new subscribers on that system have been added since. Ten have discontinued the night listing, probably using plan No. 1, and two, the city of Syracuse and the canal office, a State department, still have the old form of listing. The company claims that no discrimination is shown as those two subscribers come within the exception contained in section 92, subdivision 3, of the Public Service Commissions Law.

Complainant has refused to elect to take plan 2, and it is not

satisfied to use plan 1, and has put in use a method by which all its extensions which it desires for night use are connected with the listed trunk, the result being that a call for the Franklin Company rings the bell at every extension, and all the other trunks are idle. This form of night service is not provided for in the tariff or practice of the company, and is not recognized by it. What the complainant really wants is the service afforded by plan 1, and in addition the listing of the connected consecutive trunks without any extra charge, a service which is not provided for by the tariff filed, and which, if given to complainant alone would be discriminatory. The real question therefore is: Is the new regulation adopted by the company for night service or private branch exchange lines, which discontinues the method of operating and listing which was formerly in use in the Syracuse district, a reasonable one?

The rule is well settled, as announced by both courts and commissions, that a telephone company should be allowed reasonable latitude to adopt and enforce such regulations as will permit it to render reasonable and efficient service, and the fact that a certain form of service and equipment has been in use, which is satisfactory to certain subscribers who object to a change, should not be allowed to prevent the company making a change, and discontinuing such service and equipment when it is convinced in the exercise of good judgment and ordinary business foresight that different equipment and a different form of service will enable it to render a more efficient service to the general public. *Murray v. N. Y. Tel. Co.*, 170 App. Div. 17; *Citizens Coal Co. v. Mountain States Tel. Co.*, P. U. R. 1917 F, 882; *Matter of Lincoln Tel. & Telegr. Co.*, P. U. R. 1915 D, 803.

There is nothing that appears in this case which tends to show that the regulations in question are unreasonable. The only difference between the service furnished by plan 1 and that which complainant formerly enjoyed, and which has been discontinued, is the listing of the different departments. The reasons given for the discontinuance of this appear to be quite reasonable and are the result of much study. Complainant's objection to the

use of this plan is that no notice is given to those desiring to call the company, of the number of the different department desired. As was pointed out, this objection can be largely overcome by coöperation on the part of complainant itself, and good service of a telephone utility depends in a large measure upon the coöperation of the calling and called parties. If the trunk bearing the listed number be assigned to the extension most likely to be called, and the person answering there be instructed to give the proper number to call when any other department is desired, it would appear that fairly efficient service would be afforded, especially in view of the fact that comparatively few incoming night calls are received, an actual count of the incoming calls for a whole week's operation showing but twenty-nine. In addition, employees of the company and others from whom night calls could reasonably be expected could with but little trouble be furnished by complainant with the night listing.

If complainant finds that the night calls are sufficient in number and importance, that it is desirable that they be routed accurately and quickly, although not enough to require a night operator upon its switchboard, it may obtain this extra service by the use of plan 2, but as that requires extra equipment and extra listing, it is only fair that it should pay an extra charge for the extra service.

The only remaining question is whether the rates charged for plan 2 operation are reasonable. With complainant's present equipment these rates would be: four special multiple jacks six dollars each, twenty-four dollars; and note in directory giving hours of service six dollars, or a total of thirty dollars. The extra listings giving the numbers of the different departments would in this case not call for an extra charge, because of the extra listings which it is entitled to, because of the number of trunks in use. The evidence of the company, which is not contradicted, is that these charges are less than the actual cost of the service. We can not, therefore, say that the rate charged for this service is unreasonable.

When the complainant finished its proof a motion was made to dismiss on the ground that the complainant had not sustained the burden of proof which rests upon it under the decisions of the courts of this State, which are to the effect that in cases before the Commission the burden of proof is upon the complainant, to show that the rates are unjust and unreasonable. People ex rel. N. Y. C. R. R. Co. v. Public Service Commission, 215 N. Y. 241. As pointed out in that case this rule affects the burden of proof and not the order of proof; and the Commission prefers if possible in the case of every complaint, to bring out all the facts connected with it, and then decide the case upon the merits, having regard of course to the rule as to the burden of proof, rather than to be too technical as to the order of proof, thereby dismissing a complaint while leaving the whole question open, undetermined. It follows that the complaint should be dismissed.

All concur.

In the Matter of the Petition of SYRACUSE AND SUBURBAN RAILROAD COMPANY under Section 55 of the Public Service Commissions Law, for Authority to Issue a First Refunding Mortgage for \$1,000,000 and Bonds to be Secured Thereby

Case No. 6512

(Public Service Commission, Second District, August 8, 1918)

Application of a transportation corporation for leave to issue a first refunding mortgage and bonds to be secured by said mortgage.

The Syracuse and Suburban Railroad Company filed a petition on July 8, 1918, for permission to issue a first refunding mortgage for \$1,000,000 and bonds to be secured thereby. The petition was duly referred to the division of capitalization, which reported in favor thereof on July 30, 1918. Upon the said petition and the report of the division of capitalization the Commission authorized the execution and delivery by the said railroad company to the Fidelity Trust Company, as trustee, a corporation organized and existing under the laws of Pennsylvania, a certain indenture, deed of trust or mortgage upon all the plant and property of the petitioning company, to the aggregate of \$1,000,000 face value, bearing interest at the rate of 5 per cent per annum, but providing

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that the said company shall have no right or authority to issue any bonds pursuant to the terms of such mortgage, except as herein or hereafter authorized by the Commission. The order authorizes the issuance of \$775,000 face value of the said refunding mortgage bonds under said mortgage, to be disposed of at not less than par, and specifically sets forth the purposes for which the proceeds of such bond sale shall be used.

Petition filed July 8, 1918.

Report of division of capitalization dated July 30, 1918.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Syracuse and Suburban Railroad Company is hereby authorized to execute and deliver to the Fidelity Trust Company, as trustee, a corporation organized and existing under the laws of the State of Pennsylvania, a certain indenture, deed of trust or mortgage upon all its plant and property to secure an issue of first refunding mortgage fifty-year gold bonds, to the aggregate amount of \$1,000,000 face value, bearing interest at the rate of 5 per cent per annum, a copy of which indenture has been filed with the Commission herein, and that the form so filed is hereby approved; provided that said company shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as herein or hereafter authorized by the Commission.

2. That upon the execution and the delivery of said indenture so authorized there shall be filed with this Commission a copy thereof in the form in which it was executed and delivered together with an affidavit by the president or other executive officer of the company stating that the indenture as executed and delivered is the same as that herein approved by the Commission, and no bonds secured thereby shall be issued or sold until the provisions of this clause have been complied with.

3. That the Syracuse and Suburban Railroad Company is hereby authorized to issue \$775,000 face value of its 5 per cent fifty-year first refunding mortgage gold bonds under the afore-said mortgage, and to dispose of such bonds at not less than their face value.

4. That said bonds or their proceeds, which shall not be less than \$775,000, shall be used solely and exclusively for the following purposes:

(a) To refund or retire at or before maturity and/or acquiring by even exchange or purchase:

(1) 5 per cent first mortgage bonds dated August 2, 1897, which mature August 2, 1927, in the face amount of \$400,000

(2) 5 per cent first consolidated mortgage gold bonds dated April 1, 1903, which mature April 1, 1953, in the face amount of 150,000

\$550,000 00

(b) To discharge bills payable..... 96,573 50

(c) To discharge accounts payable..... 24,489 71

(d) To defray the cost of construction, extension and improvement of facilities as follows:

Paving East Genesee street, Syracuse \$16,900

Paving village of Fayetteville..... 7,725

Bridges in Fayetteville..... 4,000

Ballast on roadbed not now ballasted 12,000

Additions and betterments: 1 new passenger car 9,400

50,025 00

(e) Working capital 20,161 79

(f) To be held as a treasury asset of the company until a further order shall have been received from this Commission specifically authorizing the use thereof 33,750 00

\$775,000 00

in so far as the same may be applicable provided:

(1) That the proceeds of such bonds shall be applied toward

the cost of new construction summarized in subdivision (d) hereof only in so far as such new construction is a real increase in the fixed capital as defined by the uniform system of accounts for street railroad corporations.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case, where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes subject to the limitations herein contained, a sum less than the amounts set opposite thereto, no portion of the proceeds realized from the sale of such bonds over the actual costs thereof shall be used for any purpose without the further order of this Commission.

(4) That the unit prices contained in sections 4 and 5, page 5, of the petition are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual costs of which must be accounted for in the manner defined by the Commission's uniform system of accounts for street railroad corporations.

(5) That the working capital herein allowed shall not be disbursed for purposes properly chargeable to income, but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

5. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Syracuse and Suburban Railroad Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

6. That the Syracuse and Suburban Railroad Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report which shall show:

(a) What bonds have been sold or exchanged during such period.

(b) The date of such sales or exchanges.

(c) To or with whom such bonds were sold or exchanged.

(d) What proceeds were realized from such sales.

(e) Any other terms and conditions of such transactions.

(f) With respect to subdivisions (b) and (c) of ordering clause 4 of this order there shall be shown in detail the amount of the proceeds of the bonds herein authorized which has been expended for each of the purposes specified therein.

(g) With respect to subdivision (4) of ordering clause 4 of this order there shall be shown:

(1) In detail the amount of the proceeds of the bonds herein authorized which has been expended during such period for each of the purposes set forth therein, and the account or accounts under the uniform system of accounts for street railroad corporations to which the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

(2) A summary of the expenditures for each of such purposes during the period covered by the report.

(3) A summary by the prescribed accounts showing the expenditures during such period.

(h) With respect to subdivision (e) of ordering clause No. 6 of this order there shall be shown the amount of bond proceeds used therefor during such period.

In reporting under subdivisions (2) and (3) of section (g) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said bonds shall have been sold or exchanged and the proceeds expended in accordance with the authority contained herein, and if during any period no bonds were sold or proceeds expended, the report shall set forth such fact.

7. That this proceeding is hereby continued upon the records of the Commission until the examination which is to be made of the books, accounts and property of the petitioner shall have been concluded and the corrections, if any, which by reason of such examination this Commission shall determine to be proper and necessary have been made, accepted by the corporation and entered in the accounts of said company to the satisfaction of the Commission; and this order is expressly conditioned upon acceptance by the corporation of any such determination by the Commission and the compliance with any subsequent direction or order of the Commission in the premises.

8. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds issued pursuant hereto and that within thirty days of the service hereof the company shall advise the Commission whether or not it accepts the same with all its terms and conditions, and such order shall be of no force or effect until such acceptance has been filed.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purposes described in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Petition of UNITED TRACTION COMPANY under Section 49, Public Service Commissions Law, for Permission to Increase Passenger Fares

Case No. 6098

In the Matter of a Schedule of Passenger Fares Filed by the UNITED TRACTION COMPANY with this Commission May 2, 1918

Case No. 6444

In the Matter of the Complaint of JOHN H. McINTYRE, Individually and as Mayor of and on Behalf of the Residents of the City of Rensselaer, against UNITED TRACTION COMPANY as to Proposed Six-cent Fare Between Rensselaer and Albany with no Transfer in Albany

Case No. 6462

(Public Service Commission, Second District, August 13, 1918)

Effect of Laws of 1905, chapter 358, known as the Barnes Law, in controlling rates of street car fares in the city of Rensselaer and between that city and the city of Albany.

A corporation entitled to a fair return on the value of its property used and useful in the public service—this is the basis of rates even where a single corporation operates in two distinct communities through merger of previously existing local lines—a difference in rates between such communities not justified.

Circumstances showing that the petitioning company is not earning and cannot earn at present rates an adequate return on the value of its property used in the public service.

Where the case presents an emergency an actual appraisal of the property of the company need not be awaited in fixing rates.

A group of communities may be taken to constitute a single fare zone under certain circumstances under the rule of section 181 of the Railroad Law—application of this rule to the cities of Albany, Rensselaer and Troy. Interurban rate between the Troy and Albany zones.

The so-called Barnes Act (Laws of 1905, chap. 358) fixing a rate of street car fare in the city of Rensselaer, and between the cities of Rensselaer and Albany, superseded rates previously fixed by franchise and

contract by the city of Rensselaer and its predecessor, the village of Greenbush. The statutory rate so fixed may be superseded by the Commission by virtue of section 49, subdivision 1, of the Public Service Commissions Law if the facts so demand.

What a corporation is entitled to in the way of return is not necessarily enough to pay dividends or even to pay interest. It is entitled to a fair return on the value of the property used and useful in the public service. If a street railroad corporation operates in two communities as a result of merger, consolidation, or reorganization of previously existing local lines in each community the fact that there are underlying bonds of the original corporations greater in one community than in the other does not justify in itself a difference in rates. The question is as to the value of the property and not as to the manner in which money for its acquisition was procured. The affairs of the United Traction Company operating a street railroad system in the cities of Albany, Rensselaer, Troy, Cohoes, and Watervliet, the village of Green Island, and the town of Colonie examined, and they were held to show that the corporation is not earning and can not, under existing conditions, earn at present rates of fare an adequate return on the value of its property used in the public service.

The case presenting an emergency, no actual appraisal of the property of the company was undertaken. Upon evidence as to the extent of the system and general evidence as to the property owned, and upon comparisons made with other street railroad corporations within the State, it was assumed that the property is worth at least a sum equivalent to its funded indebtedness amounting to about \$58,000 per mile.

In estimating a prospective income account it was found that the company had been expending in recent years large sums to meet deferred maintenance, and had not been setting aside an adequate depreciation reserve. Its proper maintenance charges were therefore calculated upon the average of such expenses for eight of the larger systems within the Second Public Service Commission's district, the conditions of which were deemed fairly comparable. An allowance was made for a depreciation reserve equal to the minimum advised by the Commission for general use.

The communities involved, with the exception of the cities of Albany and Rensselaer, while politically independent, are contiguous and constitute, industrially and socially, a single community, and the travel is very largely from one to another. While section 181 of the Railroad Law makes the municipality the unit for rate purposes it was impossible exactly to apportion expenses among the several communities, but it was evident that conditions did not vary materially and that none taken alone would show an adequate return. Therefore, this group of communities was taken to constitute a single fare zone with a uniform rate of six cents throughout with transfer privilege.

The cities of Albany and Rensselaer are likewise situated and a single rate of six cents was provided for including both those cities with like

transfer privileges. While the operation in the Albany-Rensselaer zone has evidently been less unprofitable than that in the Troy zone it was found that there is no such difference as to warrant a difference in rates.

On the interurban line between Troy and Albany zone a through rate of twelve cents was authorized with transfer privileges to local lines in each zone.

H. T. Newcomb and John E. MacLean, for the company.

James R. Watt, mayor, and Arthur L. Andrews, corporation counsel, for the city of Albany.

Edmund N. Huyck, president, Edward T. Coffin, secretary, William E. Woollard and Peter G. Ten Eyck, for Albany Chamber of Commerce.

W. E. Drislane, in person.

Cornelius F. Burns, mayor, Thomas H. Guy, corporation counsel, and John P. Judge, assistant corporation counsel, for the city of Troy.

John J. Ryan, acting president, and E. L. McColgin, secretary, for Troy Chamber of Commerce.

John T. Starkweather, for Troy Development Corporation.

James F. Brearton in person and Owen D. Connolly in person.

Ernest L. Boothby, corporation counsel, for city of Rensselaer.

John J. Sullivan, president, for Rensselaer Board of Trade.

L. D. C. Woodward, president, for Rensselaer Chamber of Commerce.

William B. Alstein, Chester Moore and John W. Kenny, in person.

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Edwin W. Joalin, mayor, and Chester Wood, corporation counsel, for the city of Watervliet.

M. J. Foley, mayor, and D. S. Dawson, corporation counsel, for the city of Cohoes.

John T. Gorman, in person.

Frank H. Deal, attorney for the village of Green Island.

S. N. Hutchinson, president, for Chamber of Commerce, Green Island.

William A. Mellen, assistant manager transportation division, Bureau Industrial Housing and Transportation, Washington, D. C.

R. J. Lemmon, for Federal Housing Department at the Watervliet Arsenal.

W. A. McClatchy, Watervliet Arsenal, for United States Government.

LEVINE, Commissioner.—The first of these cases is a complaint under section 49 of the Public Service Commissions Law, wherein the United Traction Company alleges that its revenues are insufficient to yield a fair return on the value of its property used in the public service and asks in effect that the rate be fixed at six cents wherever the charge is now five cents with a certain additional request for charges for transfers and double fares between 12 midnight and 5 A. M. These additional requests were abandoned upon the hearing. The second case resulted from the filing, while the first application was pending, of tariffs creating in effect a zone system, and establishing additional fares to passengers riding from one municipality to another. These tariffs are under suspension by the Commission pending an investigation

of the entire matter. The third case is a complaint of the mayor of the city of Rensselaer against a proposed six-cent rate between the cities of Rensselaer and Albany without transfers. The filing of the tariffs establishing a zone system it is understood was due to the decision of the Court of Appeals in *Matter of Quinby v. Public Service Commission*, 223 N. Y. 244, holding in effect that the Legislature has not delegated to the Public Service Commission, Second District, authority to establish or permit rates for a street railroad beyond those fixed as conditions of the consent of municipal authorities to the construction and operation of the railroad in the streets of the municipality. Such restrictions were imposed by some of the municipalities concerned. They have now been removed so far as the purposes of the present case are concerned by action of the municipal authorities, except perhaps in the case of the city of Rensselaer. It is said that there were certain franchises granted by the village of Greenbush, later incorporated into the present city, and by the city itself to the United Traction Company or its predecessors, and containing certain rate restrictions. One at least of these is not in conflict with the tariffs now proposed. It is not necessary to examine these particularly, and in fact we probably have not all of them before us. The so-called Barnes Act, Laws of 1905, chapter 358, was later than these franchises and undertook to fix the rate of fare in Rensselaer, and between Rensselaer and Albany. This statute is referred to in the following paragraph. In *People v. Public Service Commission*, 143 App. Div. 769, the Appellate Division in effect held that the police power of the Legislature in such matters is superior to and supersedes such municipal action. The city of Rensselaer, in the pending case about to be stated, seems to assume that the Barnes Act supersedes the franchise restrictions, and counsel for the United Traction Company takes the same position. In this view the Commission concurs. The Commission is therefore permitted to proceed under the general provisions of law with the original case, and in view of the conclusion reached on the application to charge six cents where five cents has heretofore been the rate, it is unnecessary to consider the tariffs under suspension, and an order will be made directing their cancellation.

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The complaint of the mayor of Rensselaer was based upon the theory that the Barnes Law of 1905, chapter 358, restricts the rate of fare to five cents with transfer privileges for a continuous ride in and between the cities of Albany and Rensselaer. This was long ago the subject of a complaint before the Commission (Case No. 619), decided November, 1910, the Commission holding that the five-cent rate with transfers was the lawful rate. This decision was confirmed by the Appellate Division (143 App. Div. 769) and affirmed by the Court of Appeals (202 N. Y. 547). In denying the application for rehearing the Commission stated that if the rate of five cents in time proved unprofitable application might be made for an increase. The Quinby case holds that under proper conditions the Commission has such authority to supersede statutory rates. This relegates the question as to the sufficiency of the five-cent fare to the consideration of the general case first above named, and the company's action in proposing to continue to permit transfers eliminates the objection based on the previous proposal to withhold them.

The affairs of the United Traction Company have been so often before the Commission that it seems supererogatory to enter upon any particular description of its history and operations. Matter of United Traction Company's Proposed New Passenger Fares & Charges, etc. (Case No. 5363), decided June 26, 1916, 9 St. Dept Rep. 115; Matter of United Traction Company's Proposed New Passenger Fares & Charges, etc. (Case No. 5772), decided February 20, 1917, 12 id. 222, and several prior orders. However, in order that this opinion may be reasonably complete within itself it should be stated that the United Traction Company, like many other similar systems, is the result of reorganizations, mergers and consolidations by which a group of street railroads in what is commonly called the Capitol district was brought together under this corporation which now operates the street railroad system in the cities of Albany, Rensselaer, Troy, Cohoes and Watervliet, the villages of Green Island and Waterford, and the town of Colonie. It is and has been for some time operated in practically three divisions. One embraces the local lines in the cities of

Albany and Rensselaer. This will be styled the Albany division. Another embraces the cities of Troy, Cohoes and Watervliet, the villages of Green Island and Waterford, and a part of the town of Colonie. This will be called the Troy division. The third is an interurban line extending from the Plaza in the city of Albany with a loop crossing the Congress street and Green Island bridges, and so reaching the city of Troy, and another line operating chiefly over the same tracks from the Plaza in Albany to the city of Cohoes. This will be called the interurban line. The rate in the Albany division has been five cents with transfers; the rate in the Troy division five cents with transfers; the interurban rate Albany-Troy, Albany-Cohoes has been ten cents and since 1916 without transfer privileges on either of the other divisions. Local cars have, however, operated from Troy and from Albany to points intermediate at a single rate of five cents without transfers between these two semi-urban and semi-interurban lines. What is now sought is to install a tariff of six cents in the Albany division with transfer privileges, six cents in the Troy division with transfers privileges, and six cents on each part of the interurban lines, thus making the interurban Albany-Troy, Albany-Cohoes rate twelve cents with transfers at either end.

Incidentally it may be here stated that pending the proceedings an application came from federal officials for special consideration in the matter of rates on behalf of employees of the Watervliet arsenal who might live in Albany. This application was withdrawn, the officials stating that they would be satisfied with the proposed twelve-cent rate with transfers.

At the hearing the attitude generally of the municipalities concerned was that they were willing to submit the matter to the Commission's investigation and to accept the proposed increases in rates if the Commission should find them justified. The city of Albany and its Chamber of Commerce appeared, and particularly on the part of the Chamber of Commerce, there was strenuous opposition based upon essentially four considerations:

1. It was alleged that there is a general over-capitalization of the United Traction Company.

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2. It was alleged that by reason of its purchase of the Hudson Valley Railway Company securities the traction company has become burdened with a large charge which should not be reflected in rates charged passengers on its own lines. The circumstances of this purchase were stated by Commissioner Carr in his opinion in Matter of United Traction Company's Proposed New Passenger Fares & Charges, etc. (Case No. 5772), decided February 20, 1917, 12 St. Dept. Rep. 222.

3. That the Albany system is in itself profitable and would still be so at the five-cent fare if its operations were not loaded with the operations in the Troy division.

4. That the original company or companies operating in Troy issued bonds which are now underlying securities of the traction company to such an extent that they should be cared for by the Troy patrons and not by the Albany patrons of the road.

As to the charge of over-capitalization it seems impossible to state so plainly or to reiterate so frequently the position of this and other Commissions that the public is not or can not be confused and misled by charges that unduly high rates are permitted in order to pay interest and dividends on what is commonly known as "watered securities." What a corporation is entitled to is not necessarily sufficient return to pay dividends or even to pay interest. It is entitled to a fair return on the value of its property used and useful in the public service. *Smyth v. Ames*, 169 U. S. 466. In the circumstances of this case it is unnecessary for the Commission to make an actual appraisal of the property, for the determination has been made upon such lines that, allowing most liberally for any over-capitalization that may exist, the above principle can be applied. The capitalization is used only after extreme pruning, and incidentally only in order to reach a valuation basis of which no one except perhaps the company may complain.

As to the Hudson Valley purchase, whatever might in an appropriate case be said as to its wisdom or even its ethical aspects has no bearing on the determination of this case. The purchase was made by an issue of \$7,500,000 of stock of the traction com-

pany, but no bonds were issued for that purpose and no interest charge was created. In what follows it will be seen that this whole issue of stock is eliminated in an effort to get a minimum valuation of the traction company's property. Bonds of the Hudson Valley acquired by the traction company yielded in 1917 interest amounting to \$105,600. As against this there appear to have been advances made by the Delaware and Hudson Company, owner of the stock of the United Traction Company, part of which were undoubtedly in behalf of the Hudson Valley Company, but their total amount is such that the burden is much less than the revenue provided from the Hudson Valley bonds. The United Traction Company is not now and has not for several years been paying dividends. It is not possible that it can properly pay dividends under the proposed six-cent rates. Regardless, therefore, of the condition of the Hudson Valley and the value of its property acquired by the stock issue referred to, in the present circumstances for rate making purposes at least, the Hudson Valley is an asset and not a liability.

As to the underlying bonds on the Troy system this feature is clearly irrelevant to the present case. Interest on bonds is not an operating expense but technically a deduction from income which must be made before dividends may be paid. In other words, it is a return on invested capital. Proceeding on the basis of fixing rates with a view to the value of the property and not to a return of interest and dividends, it makes no difference in fixing rates whether a road was built with the proceeds of bonds or altogether by the sale of capital stock. Assuming that the Albany division was built entirely from the proceeds of stock, and the Troy division built entirely from the proceeds of bonds, and that the cost was exactly the same in each division, and the value of the property exactly the same the different methods of securing money for capital expenditures would have no effect on the rates.

Approaching now the question as to whether there is a general necessity for additional revenue we find the results from operation in the years named in the following table:

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TABLE GIVING CONDENSED BALANCE SHEETS AND INCOME ACCOUNTS
 Compiled from Annual Reports of United Traction Company to Public Service Commission, for
 Periods Indicated from 1913 to 1917, Inclusive

	Year ended June 30, 1913	Year ended June 30, 1914	Year ended June 30, 1915	Year ended June 30, 1916	Six months ended December 31, 1916	Year ended December 31, 1917
Balance sheet:						
Assets side:						
Fixed capital.....	\$11,349,978	\$11,353,498	\$11,594,439	\$11,665,035	\$11,662,666	\$11,730,133
Other permanent investments.....	7,466,812	7,529,448	7,154,941	7,154,941	7,154,941	7,154,941
Materials and supplies.....	138,873	181,316	124,015	142,201	157,700	175,539
Cash.....	172,798	99,564	59,503	37,618	88,394	60,310
Loans and notes receivable, Hudson Valley.....	1,921,337	2,127,971	724,000	724,000	724,000	724,000
Loans and notes receivable, other.....	4,597	1,097	1,097	897	897	897
Miscellaneous accounts receivable.....	252,476	142,332	194,355	133,981	66,833	88,801
Other current assets.....	292,578	437,320	418,914	378,727	440,854	477,919
Suspense, prepayments, special deposits, etc.....						6,636
Debits.....						
Totals.....	\$21,899,448	\$21,872,546	\$20,271,264	\$20,237,395	\$20,296,285	\$20,419,186
Liabilities side:						
Capital stock.....	\$12,500,000	\$12,500,000	\$12,500,000	\$12,500,000	\$12,500,000	\$12,500,000
Funded debt.....	6,500,000	6,500,000	6,500,000	6,500,000	6,500,000	6,500,000
Loans and notes payable, Delaware and Hudson.....	2,042,971	2,192,972	617,982	792,277	792,277	792,277
Loans and notes payable, other.....	98,137	112,494	155,000	150,000	150,000	150,000
Miscellaneous accounts payable.....	72,533	148,370	162,421	136,364	169,146	262,762
Other current liabilities.....	36,220	32,370	137,680	66,708	78,529	170,954
Reserves.....	9,823	8,220	32,360	10,853	17,254	43,173
Surplus.....	395,690	298,830	230,560	81,173	86,076	

Income account:	\$2,455,370	\$2,547,771	\$2,452,360	\$2,391,083	\$1,231,176	\$2,458,848
Railroad operating revenues.....	1,630,649	1,672,335	1,776,326	2,039,415	983,193	2,065,196
Railroad operating expenses.....						
Net operating revenue, railroad.....	\$934,721	\$975,436	\$676,034	\$351,667	\$247,983	\$403,653
Taxes accrued, railroad.....	191,136	219,411	221,365	189,880	89,938	193,794
Operating income, railroad.....	\$743,585	\$656,025	\$454,669	\$161,787	\$158,045	\$209,859
Non-operating income:						
Rents.....	\$5,138	\$940	\$1,012	\$1,191	\$543	\$3,773
Interest.....	229,223	235,747	253,602	152,317	76,443	156,548
Dividends.....	10,249	10,846	1,249	1,662	625	1,244
Other.....	858	1,816	900	790	415	404
Total non-operating income.....	\$244,358	\$249,253	\$236,563	\$156,960	\$77,197	\$181,159
Gross income.....	\$987,943	\$905,278	\$690,232	\$317,747	\$235,242	\$371,018
Deductions from gross income:						
Interest on funded debt.....						
Other interest.....	\$314,780	\$314,767	\$314,620	\$314,620	\$157,310	\$314,620
Rents.....	73,383	97,646	110,404	39,518	19,171	39,256
Other deductions.....	61,895	79,502	81,204	97,518	49,955	111,192
Total deductions from gross income.....	\$450,068	\$491,915	\$506,228	\$451,654	\$226,436	\$466,374
Net corporate income.....	\$537,875	\$413,363	\$184,004	\$155,907	\$8,806	\$36,566
Surplus or deficit account:						
Balance at beginning of year.....						
Net corporate income for year.....	\$361,905	\$395,630	\$398,930	\$230,565	\$31,173	\$39,079
Miscellaneous credits.....	537,875	413,363	184,004	155,907	8,806	36,566
Dividends.....	32,630			16,247		
Miscellaneous debits.....	500,000	500,000	250,000			
Realized depreciation not covered by reserves.....						
Miscellaneous debits.....	36,780	10,063	2,369	13,987	900	348
Balance at close of year.....	\$395,630	\$298,930	\$230,565	\$81,173	\$39,079	\$3,625

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It must be borne in mind that the accompanying table shows actual conditions in previous years under the existing or previously existing rates, under the scale of wages formerly prevailing, and under commercial conditions where the cost of materials and other expenses, while gradually increasing, were much less than can be reasonably anticipated for the remainder of the period of the war.

These figures are not, however, conclusive. A comparison, and such comparisons are always dangerous, between the operating expenses of this company and the operating expenses of other companies in the large cities in the State, shows that the expenses of the United Traction Company have been unusually high. Previous investigations of the Commission as disclosed by the opinions in cases already cited show that the traction company has failed until recently at least to maintain any depreciation reserve. Within the past few years it has been compelled to pay out unusually large sums for maintenance of way and maintenance of equipment. In the absence of reserves to meet these expenses the operating expenses have been unduly increased. The principal item of increased expense has been maintenance of way, and this is in large measure due to an extensive system of street improvements, particularly in Albany, involving the replacing of old track and the laying of new pavements. In reaching a conclusion the Commission has endeavored to discriminate between programme expenditures covering routine repairs and replacements which would ordinarily be borne as current operating expenses, and extraordinary expenditures which indicate the items which properly should have been provided against by a depreciation reserve. For maintenance of way and equipment the following figures appear:

	Programme expenditures	Extraordinary expenditures upon designated projects	Total
1913.....	\$137,289 39	\$90,017 22	\$217,306 61
1914.....	201,373 73	44,456 15	245,829 88
1915.....	201,802 79	172,488 87	374,291 66
1916.....	244,215 59	101,892 59	346,108 18

It therefore becomes necessary in forecasting the future to make allowance for these extraordinary items of expense for the past few years and to reduce the operating expenses accordingly. The following table assumes that the proposed six-cent fares are in effect with an estimated increase in operating revenue of about \$400,000. Much more than this can not be expected. The charges for current maintenance are made on the assumption that maintenance cost per revenue car-mile will normally be the same as the average cost per car-mile of eight other cities in this Public Service Commission district. This method is possibly severe upon the company. The depreciation allowance is added according to the scheme which the Commission has recorded itself as believing to represent the minimum rate that should be employed. No increase in general expenses over 1917 is allowed. The transportation expenses are based upon the company's estimate and include an increase over old rates of pay to those which have prevailed for several months. A strike was inaugurated against previously existing rates with a result that a compromise was reached whereby the pay of motormen and conductors was raised to thirty-seven and one-half cents an hour. It had previously been thirty-one. The company estimates that this additional expense will amount to \$345,000 per annum. At the same time it was agreed to submit to the Federal War Labor Board for arbitration the question of a further increase, and the Commission is now informed that an award has been made fixing forty cents as the minimum pay. The company's estimates have been checked and found to be approximately correct, but in the table appended there is not included the additional \$100,000 per annum which will probably result from the latest increase. In estimating revenue it has been assumed that the number of passengers will decrease 10 per cent because of the increase in rates. Expense of maintenance of way and structures, and of equipment are based on the expense of 1917 and it is more than probable that actual expense will show a decided increase. In allowing depreciation reserves no favor is extended to the company. They are in the interest of the public in order, to a certain extent, to ensure the ability of the company to make

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proper retirements and replacements, and so to maintain its service. The amount allowed is very moderate for that purpose.

Constructive income account for United Traction Company, 1918, assuming six-cent fares, and elimination of deferred maintenance:

1917 passenger revenue.....	\$2,410,783	
Estimated increase from six-cent fares.....	407,434	
Other operating revenue, 1917.....	48,065	
		<hr/>
Estimated operating revenue with six-cent fares.....		\$2,866,282
Maintenance of way and structures on basis of average cost per car-mile to eight other city traction companies in 1917.....	\$177,213	
Depreciation of way and structures at approximately 2 per cent of cost.....	109,735	
Maintenance of equipment on basis of average cost per revenue car-mile to eight other city traction companies in 1917	203,613	
Depreciation of equipment at approximately 2 per cent of cost	54,868	
Traffic, 1917	1,447	
Transportation, company's estimate for 1918 on basis on first five months' actual.....	1,274,270	
General, 1917.....	251,488	
		<hr/>
Estimated operating expenses.....	\$2,072,634	
Taxes, company's estimate for 1918.....	195,000	
		<hr/>
		2,267,634
		<hr/>
Operating income, estimated		\$598,648
Return on capital other than dividends:		
Rents, 1917	\$111,192	
Amortization of landed capital, 1917.....	1,306	
Interest on funded debt.....	314,620	
Interest on floating debt, estimated.....	14,222	
		<hr/>
		441,340
		<hr/>
Balance		\$157,308
		<hr/>

In order to reach an appraisal much time and a large expenditure of money would be required. The company is confronted with a real emergency as disclosed by the foregoing statements.

The company has about one hundred and twelve miles of track,

a portion of which is operated under lease, but the entire burden of maintenance rests upon this company, and except nominally this company is the real owner. All except about ten miles is on paved streets. The company has rolling stock reasonably commensurate with such an extensive system. It has a power house, substations, and other power equipment, an office building, and car barns. Its balance sheet as of December 1, 1917, shows total fixed capital \$11,750,132.69 with construction work in progress \$414,499.88. It has outstanding \$6,500,000 of bonds none of which as above stated was issued on account of the Hudson Valley. This funded debt amounts to about \$58,000 per mile of track. A comparison of this and other items with the average of all electric railroads in the Second Public Service Commission's district follows:

	FUNDED DEBT		STOCK		FIXED CAPITAL	
	1916	1917	1916	1917	1916	1917
Other electric railroads.....	\$52,600	\$47,300	\$39,900	\$38,700	\$83,800	\$84,600
United Traction Company.....	.....	58,000	.....	44,600	.....	104,700

It will be seen that the funded debt of the United Traction Company is somewhat above the average but the average given includes both urban and interurban lines, roads on unpaved highways, and roads of light equipment and light construction. The average of fixed capital per track-mile is much higher than the funded debt per track-mile of the United Traction Company. The ratio of the funded debt to the fixed capital accounts is not very different between the United Traction Company and the average of other roads. Corresponding figures for four of the larger systems in the State which might be deemed comparable, are as follows:

	Funded debt	Stock	Fixed capital
United Traction Company.....	\$58,000	\$44,600	\$104,700
New York State Railways.....	52,900	50,960	107,600
International Railway.....	70,600	42,000	109,200
Schenectady Railway.....	23,300	35,800	64,200

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In these cases the mileage is taken by including leased lines and excluding the mileage operated over lines of other companies through trackage contracts, the lines being in no sense the property of the operating company. The inference is very strong that the road is worth at least its funded debt. It may be worth much more. It seems safe to assume that it is entitled to earn interest on an amount equal to its funded debt and other fixed charges. In the estimate given above which certainly holds out as much hope to the company as it can dare to expect to be realized, there is left only a balance of \$157,308 after paying operating expenses and these fixed charges. When allowance is made of \$100,000 to meet the most recent increase in wages the estimate affords only about \$57,000 as a cushion to meet any errors in the estimate. Taking \$500,000 as the probable operating income this would yield a return of only $7\frac{1}{2}$ per cent on the value of the road assuming the funded debt to represent that value. This would not be more than a fair return if the sum estimated should be taken as the actual value. We are not in fact fixing \$6,500,000 as the actual value of the road, but merely as the irreducible minimum for the purpose of this case alone. If we had the actual value it would probably show that the possible income will yield much less than a fair return.

It is perfectly evident that, with the present revenues and the existing and coming expenses, there will be no return at all, and that the company would be facing inevitable bankruptcy.

Having reached the conclusion that the company is entitled to relief in the way of increased revenues we must ascertain whether the method proposed of effecting the increase is just and reasonable. The Troy zone, while it is a group of politically separated municipalities, is compact and might for most purposes except those of government be treated as one community. In fact the industrial and social, using the latter term in its broader as well as its narrower sense, interests of those municipalities blend together to a large extent. Indeed the cities of Troy and Water-vliet and the village of Green Island, in adopting the resolutions waiving the fare restrictions in their respective franchises,

have insisted that a common rate should be adopted in the group constituting the Troy zone. What is said of the Troy zone applies also to the cities of Albany and Rensselaer, but perhaps not to the same extent. We must remember, however, that section 181 of the Railroad Law makes the municipality the unit, and we can not relieve the company from the operation of this section without finding that in the particular municipality affected the income is insufficient to yield an adequate return. The operating expenses have not been segregated by municipalities. The uniform system of accounts has not required that they should be so segregated and a complete segregation, except as many items of expense might be roughly and inexactly apportioned, is impossible. The travel in the Troy zone is so largely from one municipality to the other that it may be safely assumed that the same conditions apply substantially in each. It has not been claimed as to this zone that there is any substantial difference in operating results as between the different municipalities. It must be inferred that the inadequacy of return so far as it is applicable to this zone distributes itself fairly evenly among the municipalities composing it. Certainly there is no ground for any inference that the company operating in any single one of those municipalities could operate at a profit at present fares.

It is urged, however, that Albany stands on a different footing, and that the Albany operation taken by itself would show a reasonable profit under existing rates. Undoubtedly the revenues in the Albany zone are much higher than those of the Troy zone. The number of passenger fares in 1917 were in the Albany zone 21,764,171; in the Troy zone 16,305,331. The revenue per car seat-mile in the Albany zone is calculated from the evidence and reports of the company about four and thirty-two one-hundredths cents, in the Troy zone three and forty-one one-hundredths cents. It is claimed that the cost of operation is much greater in the Albany zone than in the Troy. This is undoubtedly true, but unfortunately we are without evidence to determine what the difference is. It seems that the principal cause of the difference is

that practically all the lines in Albany have to surmount very considerable grades, and that these are mostly close to the business center and in the region of congested travel. There are grades also in the Troy division, but they are in more outlying districts, much fewer cars are operated, these cars are much lighter, and the traffic is much lighter in the hill region than in the level parts of the district. These conditions lead to a very considerable power expense in Albany as against Troy, and a greater cost of car maintenance. There is testimony to the effect that the cost of operation under the present wage scale (that put in force in May) would result in an operating cost of upward of thirty-seven cents per car-mile but there are only two lines in Albany which in 1917 realized such earnings. These are the West Albany and the Albany Belt lines, the former forty and eighty-nine one-hundredths cents and the latter forty-five cents. What was termed a "weighted average" for the Albany zone was twenty-eight and sixty-one one-hundredths cents. Two inferences may be drawn from these facts: *First*, the essential one from a legal standpoint to draw that the Albany operation in and by itself would not yield an adequate return under existing conditions and that, therefore, an increase in fares is essential in Albany. *Second*, that the difference between Albany and Troy is not so great as to warrant a difference in fares in order to provide the revenue absolutely necessary. A five-cent rate in Albany would impose a very much higher rate on Troy with Albany operation unprofitable. With a six-cent rate in Albany it does not become necessary to increase the Troy rate beyond that amount under present circumstances.

The proposed schedule is simple, and operates uniformly. It provides liberally for transfers and restores them between interurban lines and the lines in the Troy and Albany zones. The writer is still individually of the opinion that, generally speaking, transfers between interurban and urban lines are undesirable, and that interurban rates ought to be adjusted in such manner as to permit their exclusion. The company admits that the elimination of transfers between the interurban and the urban cars in February, 1917, has not resulted as it was hoped,

and the patrons remain discontented. On the whole, therefore, it seems that the proposed tariffs are about as fair as could at present be devised, if we preserve the established American policy of uniform rates throughout the city without creating fare zones or distinguishing between different lines.

We are dealing now with an emergency. The northern communities in waiving the franchise restrictions limit their waivers, Troy until the signing of a general treaty of peace, Watervliet and Green Island until twelve months after the signing of such a treaty. The order will provide that the rate therein fixed shall be limited in duration to the shorter period unless the Commission upon a showing of changed conditions shall otherwise determine. It may be that during the continuance of the war conditions may so change as to demand either a reduction or a further increase. If such should be the case the rights of the municipalities under their franchises and the law would, of course, be respected by the Commission.

Commissioners Hill, Fennell and Cheney concur. Commissioner Barhite not present.

PETITION OF ROCHESTER RAILWAY AND LIGHT COMPANY, under Section 69, Public Service Commissions Law, for Authority to Make a Refunding and Improvement Mortgage and to Issue now \$3,900,000 in 7 per cent Three-Year Bonds to be Secured Thereby

Case No. 6535

(Public Service Commission, Second District, August 27, 1918)

Permission granted to a railway and lighting company to make a refunding and improvement mortgage and to issue now certain 7 per cent three-year bonds to be secured thereby.

The Rochester Railway and Light Company petitioned the Commission for permission to execute and deliver to the Bankers Trust Company of New York, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or

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mortgage upon all of its plant and property, dated as of September 1, 1918, to secure an issue of \$3,900,000 face value of its general mortgage gold bonds. The application was granted giving the corporation authority to issue bonds to the amount asked under the aforesaid mortgage, said bonds to mature September 1, 1921, and to bear 7 per cent interest per annum, to be known as Series A bonds, the proceeds of such bonds so authorized to be used exclusively for the payment of bills and accounts payable.

Petition filed August 6, 1918.

Report of division of capitalization dated August 26, 1918.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Rochester Railway and Light Company is hereby authorized to execute and deliver to the Bankers Trust Company of New York, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or mortgage upon all its plant and property, dated the 1st day of September, 1918, to secure an issue of general mortgage gold bonds, a tentative copy of which indenture has been filed with the Commission herein, provided that no bonds shall be issued under the security thereof until said indenture shall have been approved in its final form by the Commission.

2. That the Rochester Railway and Light Company is hereby authorized to issue \$3,900,000 face value of its general mortgage gold bonds under the aforesaid mortgage, which bonds are to mature September 1, 1921, and to bear interest at the rate of 7 per cent per annum and which shall be known as series A bonds, provided that none of such bonds shall be sold until the proposed sale price shall have been submitted to and approved by this Commission and the form of mortgage approved as provided in ordering clause 1 herein.

3. That the proceeds of said bonds so authorized shall be used solely and exclusively for the funding of the following obligations of the company outstanding at June 30, 1918, as detailed in Exhibit A attached to its petition herein, or the renewals thereof:

(1) Bills payable	\$3,280,000 00
(2) Accounts payable	669,474 52
<hr/>	
Total	\$3,949,474 52
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4. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Rochester Railway and Light Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

5. That the Rochester Railway and Light Company shall for each six months' period ending December thirty-first and June thirtieth, file not more than thirty days from the end of such period a verified report which shall show

(a) What bonds have been sold during such period.

(b) The dates of such sales.

(c) To whom such bonds were sold.

(d) What proceeds were realized from such sales.

(e) Any other terms and conditions of such sales.

(f) In detail the amount of the proceeds of the bonds herein authorized which have been expended for each of the purposes specified herein.

Such reports shall continue to be filed until all of said bonds have been sold and the proceeds expended in accordance with the authority contained herein and if during any period no bonds were sold or proceeds expended the report shall set forth such fact.

6. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any bonds are issued pursuant hereto and within thirty days of the service thereof, the company shall advise the Commission whether or not it accepts the same with all its terms and conditions, and such order shall be of no force or effect until such acceptance has been filed.

7. That this proceeding is hereby continued upon the records

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of the Commission until the examination which is now being made of the books, accounts and property of the petitioner herein shall have been concluded and the corrections, if any, which by reason of such examination this Commission shall determine to be proper and necessary shall have been made, accepted by the corporation and entered in the accounts of said company, to the satisfaction of the Commission; and this order is expressly conditioned upon acceptance by the corporation of any such determination by the Commission and compliance with any subsequent direction or order of the Commission in the premises.

8. Finally it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Petition (or Complaint) of WESTERN NEW YORK AND PENNSYLVANIA TRACTION COMPANY under Subdivision 1, Section 49, Public Service Commissions Law, for Permission to Increase Passenger Fares

Case No. 6479

(Public Service Commission, Second District, September 5, 1918)

Permission granted an electric railroad, mainly interurban, to file tariffs based on a rate of three and one-half cents a mile, with rates of seven cents within the limits of two neighboring cities.

The Western New York and Pennsylvania Traction Company is a corporation operating an electric railroad, mainly interurban. From Olean in this State as a center the interurban lines of the company extend in an easterly, southerly and westerly direction, extending toward the south and toward the east into the State of Pennsylvania. There are several minor branches. In Salamanca there is urban operation over the interurban line and over the interurban and also over local lines in the city of Olean. The company's lines aggregate over one hundred miles, much the greater part of which is in the State of New York. The present

petition is for the right to increase the urban rates of fare in the two cities named from five cents to seven cents and to increase the through rates within the State of New York to a basis of three and one-half cents a mile. *Held*, from the facts shown, that the system in the past has not yielded anything like an adequate return and that under the new rates proposed it is not likely to yield more than four and one-half per cent, which is still inadequate to attract capital; that in the city of Salamanca the proposed rate is not likely to be much more than four per cent; that the company is in need of an increase in both cities and throughout its line; that the increases proposed ought to yield a fairly adequate return in Olean but cannot be expected to do so in Salamanca or on the entire system; that the company should not be required to accept an inadequate return in Olean merely because it must content itself with an inadequate return as an entirety or in the city of Salamanca; that the proposed rates are high but in view of the circumstances the Commission cannot find that they are unreasonable; that the proposed changes in rates as detailed in the proposed schedule filed do not seem in all instances to conform strictly to the prayer of the petition or the terms of the order which will be entered. The order therefore is not to be taken as an approval of the proposed tariffs so presented but it is an approval of the basis upon which the tariffs may be constructed. When the tariffs are filed any variations from the order or errors in computation will be corrected.

Dowd & Quigley, by James Quigley, for petitioner.

John K. Ward, for the City of Olean; Foster Studholme, Mayor of Olean.

Emmet E. Warn, Mayor of Salamanca; J. M. Seynour, city attorney, Salamanca, N. Y.

T. C. Jordan, for the village of Limestone.

IRVINE, Commissioner.—The Western New York and Pennsylvania Traction Company operates an electric railroad mainly interurban. Taking Olean as a center its interurban lines extend easterly to Bolivar in Allegany county with a branch from near Ceres to Shingle House, Penn. Southerly from Olean a line extends across mountains to Bradford, Penn. Another line extends westerly to Salamanca, and thence to Little Valley in Cattaraugus county. Diverging from this at Seneca Junction

another line extends southerly to Bradford, Penn. There seems to be a still further line from Bradford to Lewis Run, Penn. There is urban operation over the interurban line in Salamanca and over the interurban and also over local lines in the city of Olean. The interurban line passes through several incorporated villages but the intra-village operation must necessarily be negligible. The entire extent of the company's lines is above 100 miles, much the greater part of which is in the State of New York. The petition is for permission to increase the urban rates of fare in the cities of Olean and Salamanca from five cents to seven cents and to increase the through rates within the State of New York to a basis of three and one-half cents per mile. The city of Olean has a population of approximately 20,000; the city of Salamanca a population of approximately 10,000; the city of Bradford in Pennsylvania a population of approximately 17,000. The evidence indicates that the population of the entire region served by this system does not exceed 75,000. It will thus be seen that it is an extensive system operating in three considerable communities, two of which are in the State of New York and one in Pennsylvania, and that the remainder of the territory is sparsely peopled. It may be added that in large part it traverses a terrain difficult of operation.

One difficulty usually confronting the Commission in such cases is eliminated in this: there has been a complete inventory and appraisal of the property of the corporation used in the public service with an allocation thereof as to the two cities concerned in this application, Olean and Salamanca. This has been approved by the Commission. The total fixed capital is \$4,425,378.89. The total "bare bones" allocation to the city of Olean is \$160,576.11; to Salamanca \$87,035.30. Apportioning general costs on a percentage equivalent to the ratio of the total general costs to the total "bare bones" costs, we have a valuation for the city of Olean of \$251,594.55; for the city of Salamanca \$136,390.37. In this total valuation there appears only about \$22,000 of intangibles. It may be here stated that the company has had outstanding: first preferred stock 6 per cent

cumulative \$599,355; second preferred stock 5 per cent non-cumulative \$1,000,000; common stock \$1,000,000.

By canceling the common stock the capitalization is reduced to the actual appraisal. This step the corporation is in position to make, has undertaken to make, and is in process of making. The result will be a corporation with outstanding capital securities only \$22,000 in excess of the actual value of its tangible assets. Its management is to be commended for placing the corporation on this solid basis.

The following tables show: *a.* In a condensed form the income account for 1916 and 1917, and the first three months of 1918, for the entire system. There are estimated corresponding figures for the complete calendar year, assuming the proposed rates to be in effect. The column headed 1 is on the basis of the number of passengers remaining unchanged; column 2 on the theory that passenger travel will decrease 10 per cent because of increased rates.

b. A corresponding table relating to the city of Olean.

c. A corresponding table relating to the city of Salamanca. In the case of the two cities, however, we have the actual results of four months of operation instead of three, upon which to estimate the complete calendar year. Each table also shows the ratio of return upon fixed capital in the case of the cities, allocated and apportioned as above stated.

ENTIRE SYSTEM

ITEM	1916	1917	Three months, 1918	Estimated, complete calendar year	
				1	2
Gross receipts.....	\$449,746 51	\$456,174 95	\$100,375 11	\$640,000 00	\$590,000 00
Operating expenses...	254,208 17	293,652 85	75,251 34	360,000 00	380,000 00
Net earnings from operation.....	\$195,538 34	\$162,522 10	\$25,123 77	\$280,000 00	\$230,000 00
Taxes.....	23,960 53	27,580 65	8,002 58	32,000 00	32,000 00
Net income.....	\$171,577 81	\$134,941 45	\$17,121 19	\$248,000 00	\$198,000 00
Total fixed capital allocated.....			\$4,425,378 89		
Ratio of annual return upon fixed capital..	3.88%	3.05%	1.55%	5.6%	4.47%

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CITY OF OLEAN

Item	1916	1917	Four months, 1918	Estimated, complete calendar year	
				1	2
Gross receipts	\$50,656 85	\$60,767 50	\$18,548 97	\$82,000 00	\$73,000 00
Operating expenses	22,817 23	37,530 06	13,837 53	47,000 00	47,000 00
Net earnings from operation	\$36,839 62	\$23,237 53	\$4,711 44	\$35,000 00	\$26,000 00
Taxes	5,168 57	6,617 23	2,712 54	8,000 00	8,000 00
Net income	\$31,681 05	\$16,620 30	\$1,998 90	\$27,000 00	\$18,000 00
Total fixed capital allocated			\$251,504 55		
Ratio of annual return upon fixed capital	12.50%	6.6%	2.39%	10.73%	7.15%

CITY OF SALAMANCA

Item	1916	1917	Four months, 1918	Estimated, complete calendar year	
				1	2
Gross receipts	\$19,167 18	\$19,786 21	\$4,624 79	\$27,000 00	\$24,000 00
Operating expenses	10,543 86	12,219 96	3,450 09	15,000 00	15,000 00
Net earnings from operation	\$8,623 32	\$7,566 25	\$1,174 70	\$12,000 00	\$9,000 00
Taxes	1,440 55	1,865 58	1,148 93	3,500 00	3,500 00
Net income	\$7,182 77	\$5,700 67	\$25 77	\$8,500 00	\$5,500 00
Total fixed capital allocated			\$136,390 37		
Ratio of return upon fixed capital	5.34%	4.18%	0.06%	6.23%	4.03%

The company has been paying in the past to its motormen and conductors only from twenty-one cents to twenty-seven cents an hour according to length of service. An immediate and very considerable increase has become necessary in order that it may retain or obtain platform men. In estimating operating expenses an increase has therefore been allowed of 25 per cent to cover not only this increase in pay but also increases of other labor and material, of which everyone may now take notice, or if he do not notice will be thrust upon him. For the entire system no increase has been calculated in general and miscellaneous expense. For the cities of Olean and Salamanca such increases have not been excluded, partly because they would have no material bearing on the result and partly because it is thought that other increases are likely to be greater than in the country districts.

The following conclusions result: 1. The system as a whole has not in the past yielded anything like an adequate return and under the new rates proposed it is not likely to yield more than 4½ per cent which is still inadequate to attract capital.

2. In the city of Salamanca the return has in the past been inadequate and under the proposed rates the return is not likely to be much more than 4 per cent.

3. In the city of Olean the return in the past has been fairly adequate and under the proposed rates a return of about 7 per cent is probable. This is certainly no more than an adequate return.

The company needs an increase in both cities and throughout its line. The increases proposed ought to yield a fairly adequate return in Olean but can not be expected to do so in Salamanca or on the entire system. The company should not be required to accept an inadequate return in Olean merely because it must content itself with an inadequate return as an entirety or in the city of Salamanca. A six cent fare or a rate of three cents a mile would not promise an adequate return or anything approaching an adequate return on the property as a whole or even in the city of Olean. The rates proposed are high, but in view of the circumstances the Commission can not find that they are unreasonable.

Owing to the inadequate return of past years the corporation has been unable to maintain its property in such condition as to afford the service to which the public is justly entitled. Under the new rates it should be able to pay the fixed dividends on its preferred stock and to devote a considerable sum to maintenance and deferred maintenance. No further dividends should be paid until the road is fully rehabilitated.

The franchise under which the corporation operates in the city of Salamanca contains a restriction limiting the rate of fare to five cents in Salamanca, and between Salamanca and East Salamanca. The municipal authorities have enacted an ordinance which has been accepted by the corporation amending such franchise so that the corporation may charge such rate

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of fare as this Commission may fix, but with two conditions: One is that any excess over five cents shall not be continued for a longer period than three years from the date of the ordinance (June 18, 1918), but that it may be continued for a period ending one year after the close of the war. This expression is somewhat ambiguous but a proper limitation for all rates seems to be that they shall not continue beyond one year after the signing of a general treaty of peace unless the Commission shall in the meantime otherwise determine, subject to the rights of the city of Salamanca and the other communities under the law. The other condition is that the company shall operate its local lines between East Salamanca and West Salamanca on a forty-minute schedule between the hours of 6:30 a. m. and 11 p. m. The present service is hourly. It is not necessary in the order to insert this condition. It is not to be presumed that the corporation after accepting the ordinance will violate it. Should it do so the Commission in its regulative capacity will entertain a complaint.

Accompanying the petition is a copy of the proposed schedule of rates and tariff regulations. The proposed changes in rates are indicated in ink, and do not seem in all instances to conform strictly to the prayer of the petition or the terms of the order which will be entered. Therefore, the order is not to be taken as an approval of the proposed tariffs so presented, but it is an approval of the basis upon which the tariffs may be constructed. When the tariffs are filed it is expected that any variations from the order or errors in computation will be corrected. The proposed tariff regulations also contain changes in some other respects. These changes were not called to the attention of the public by the petition or the notices of hearing, and were not the subject of investigation. Any changes in rates or regulations other than those herein discussed and provided in the order must be made in the regular way upon statutory notice to the Commission and the public.

All concur except Commissioner Barhite, not present.

**In the Matter of Complaints of Commuters against ROCHESTER
AND SYRACUSE RAILROAD COMPANY, INC., as to Proposed
Increase in Commutation Passenger Fares**

Case No. 6424

(Public Service Commission, Second District, September 10, 1918)

Complaints against certain existing rates of a transportation corporation alleged to be excessive not sustained—the particular lines under consideration.

The power of the Commission in the matter of commutation rates.

Facts adduced as to the details of the defendant company analyzed.

The case herein considered includes several complaints against the commutation tariff filed by the Rochester and Syracuse Railroad Company, Inc., effective May 5, 1918. Of these complaints four were against the rate from Weedsport to Syracuse; two against the rate from Jordan to Syracuse; one against the rate from Lyons to Syracuse; two against the rate from Palmyra to Rochester and one against the rate from Macedon to Rochester. These complaints were consolidated and tried as one case. The commutation rates in question were reached upon the basis of one and one-quarter cents per mile between the different stops on the road and the city line of Syracuse and Rochester, respectively, and in those cities the regular city rate is added. The contention of the complainants is that the rates are excessive. Concededly a commutation rate is a lower rate than that for which ordinary passengers are carried and is justified upon the theory that a person who uses the road regularly every day should have a lower rate because of the advantages accruing to the railroad from having regular users resident upon its lines, but nevertheless the Commission has no arbitrary power to fix such rates but is required by the law to take into account the cost of giving service and the return on invested capital.

The power of this Commission is defined by section 49 of the Public Service Commissions Law in respect to such rates as are here considered, and the statute provides that whenever either Commission shall be of the opinion, after a hearing, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for commutation passenger tickets or any other form of reduced rate tickets for the transportation of persons within the State, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in violation of any provision of law or that the maximum rates, fares or charges collected or charged for any of the forms of reduced fare passenger transportation tickets are insufficient to yield reasonable compensation

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for the service rendered, and are unjust and unreasonable, the Commission shall, with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making a reservation out of income for surplus and contingencies, determine the just and reasonable maximum rates to be observed and enforced for such commutation or any other form of reduced rate tickets for the transportation of passengers. *Held*, that the Commission must apply these rules as stated in the cases cited in the opinion.

The defendant company was organized by a committee of bondholders of a previous corporation which had gone into the hands of receivers. The committee formed the present company under a reorganization agreement approved by the Commission, and the present company has operated the road since September 1, 1917. The amount actually invested in this property is about \$6,500,000. On the reorganization the bond issue was limited to \$2,500,000; preferred stock issued was \$2,500,000 and common stock \$1,500,000, practically all of which is in the hands of the original bondholders and represents what they have to show for the bonds which they held originally. From the reports of the present company up to March 31, 1918, covering seven months, the operations of the company show a corporate deficit for that period of \$16,143.95. The period in question includes the portion of the year the least favorable to the company, but sufficient is shown to make it evident that a fair return would not be realized by operating the road under the rates in force during that time. The existing new schedule of commutation rates was therefore prepared and filed and it is against these rates that the present complaints are made. *Held*, that there has been a failure to show that under all the circumstances the present commutation rates are either unjust or unreasonable. The Commission therefore prefers to allow operation under these rates to continue for a sufficient length of time so that accurate data may be available and the complainants may then move to reopen the proceeding.

H. D. Bailey, for complainants.

Frank M. Parsons, for the village of Weedsport.

R. V. Avery, in person.

Hiscock, Doheny, Williams & Cowie, by A. H. Cowie, for respondent.

T. C. Cherry, as vice-president and general manager of respondent.

CHENEY, Commissioner.— This proceeding concerns complaints filed against the commutation rates included in the tariff filed by the Rochester and Syracuse Railroad Company, Inc., effective May 5, 1918. Four complaints were filed against the rate from Weedsport to Syracuse, two against the rate from Jordan to Syracuse, one against the rate from Lyons to Syracuse, two against the rate from Palmyra to Rochester, and one against the rate from Macedon to Rochester. These complaints were consolidated and tried as one case. At the hearing the complainants upon the Syracuse end were represented by counsel. The complainants upon the Rochester end did not appear. These commutation rates were constructed upon the basis of one and one-fourth cents per mile between the different stops upon the road and the city line of Syracuse and Rochester, respectively, and in those cities the regular city rate is added. The complaints are informal but are generally based upon the ground that the rates are unjust as being too high.

While a commutation rate is concededly a lower rate than that for which ordinary passengers are carried and is justified upon the theory that a regular rider who uses the road every day should have a low rate because of the advantages accruing to the railroad from having regular users resident upon its lines (*Taxpayers Alliance v. N. Y. C. R. R. Co.*, P. U. R. 1917 B, 264; *Long Island R. R. Co.*, id. 1917 C, 1019) still the Commission has not arbitrary power to fix such rates, but is required by the law to take into account the cost of giving the service and return on invested capital.

This rule has been stated by the United States Supreme Court in a recent case in the following language: "It was recognized that the state has broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction: that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the state has

no arbitrary power over rates; that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a commodity or class of traffic, and that instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal. (Norfolk & Western R. R. Co. v. Conley, 236 U. S. 605; see also Northern Pacific R. R. Co. v. No. Dakota, 236 U. S. 585.)"

Applying this rule to the matter of reducing commutation fares, the United States District Court has distinctly held that in order that a commission may prescribe reduced commutation rates, it must at least appear that the aggregate return to the carrier is just, fair, and reasonable, and if it falls short of this, even to a negligible extent, such reduction is not justified; and it can not be supported on the grounds of local public demand or interest, by the commission's views of the probable beneficial effects of such rates upon the company's business, or by what other carriers have done or have been required to do under different conditions in different localities. Kansas City, etc., Railroad Co. v. Barker, 242 Fed. Repr. 310.

The power of this Commission is defined by section 49 of the Public Service Commissions Law, the material parts of which read as follows: "Whenever either Commission shall be of the opinion, after a hearing had upon its own motion, or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for * * * commutation passenger tickets * * * or any other form of reduced rate tickets for the transportation of persons within the state * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, *or that the maximum rates, fares or charges collected or charged for any of such forms of reduced fare passenger transportation tickets by any such common carrier, railroad or street rail-*

road corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable * * * the Commission shall with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and enforced as the maximum to be charged for such * * * commutation * * * or any other form of reduced rate tickets for the transportation of persons."

From this it would appear that the Legislature, in its grant of power to this Commission to fix commutation rates has expressly directed it to apply the rules laid down by the courts as stated in the foregoing cases, and should the Commission do otherwise it would violate both precedent and statute.

The Rochester and Syracuse Railroad Company, Inc., operates an interurban electric road from Syracuse to Rochester. This road was built about ten years ago by the Rochester, Syracuse and Eastern Railroad Company and was operated since that time by that company and by the Empire United Railways, Inc., into which it was consolidated, until November, 1917, when receivers were appointed. The receivers operated the railroad, pending foreclosure proceedings upon the mortgage existing thereupon until the sale. The property was bought in at the foreclosure sale by a committee of the bondholders who formed the present company under a reorganization agreement, which was approved by this Commission, and the present company has operated the road since September 1, 1917.

The accounts of these companies have been frequently before this Commission in capitalization cases, and it has had occasion to determine the amounts of capital actually invested in the company, at different times. From the evidence before the Commission in those cases it may be said that the amount actually invested in this property fairly equals \$6,500,000. It appeared in the reorganization case that the road and equipment actually cost \$7,237,473.45 and that the reproductive cost would be a much larger figure. The authorized bond issue of the Rochester,

Syracuse and Eastern Railroad Company at the time of foreclosure was \$5,000,000, of which all but a very small amount was issued and outstanding in the hands of the public. Upon the reorganization the bond issue was limited to \$2,500,000; preferred stock issued was \$2,500,000, and common stock \$1,500,000; practically all of which is in the hands of the original bondholders and represents what they have to show for the bonds which they held originally.

The present company began operation September 1, 1917, and reports of operation up to March 31, 1918, covering seven months, show total revenue \$399,970.98, total operating expenses \$301,828.28, taxes \$19,500, leaving a gross income of \$78,642.70, out of which to pay fixed charges, interest, and return to stockholders. During that period the bond interest amounted to \$62,681.77; other interest and rent deductions \$32,704.88, leaving a net corporate deficit for seven months' period of \$16,143.95. It is true that that period includes the portion of the year when the income was the smallest and the operating expenses the largest, and therefore a fair estimate of a year's operation can not be made by projecting these figures forward for twelve months in the same proportion. But enough is shown to make it evident that a fair return would not be realized by the operation of the road under the rates in force during that time.

In April, 1918, the company filed a tariff schedule which it proposed to make effective May 5, 1918, which generally readjusted its rates, lowering some and increasing others, but which was built upon certain fixed principles. The old fares were arranged upon a basis of multiples of five cents, which was the minimum fare, in such a way that the rates between the different stops approximated as near as could be two cents per mile for cash fares and one and three-fourths cents per mile for ticket fares, with the commutation fares fixed at an arbitrary figure, not upon a mileage basis, but decreasing per mile for the longer hauls. The new fares are arranged on the mileage basis with a six cent minimum, the cash fare being two and one-fourth cents per mile, the ticket fare two cents per mile, the commutation fare one and one-fourth cents per mile, and the mileage book one and

three-fourths cents per mile. These fares are computed to the city line at both Syracuse and Rochester, and the regular city fare in those cities is added to the rate, as the cars of the company are operated in those cities over the tracks of the local companies.

No computation of estimated revenues upon the basis of the new schedule of rates has been furnished to the Commission in this case, and we have no accurate means of determining whether or not the operation of the road thereunder would yield a fair return, or more or less than a fair return upon the capital invested in the service. No complaint has been filed against any of the rates in the new schedule except the commutation rates as above stated.

Since the beginning of this proceeding a report of the operation of the company for the three months ended June 30, 1918, has been filed. This shows the result of operation under the new schedule of rates for practically two months of that period, and this is much better evidence than any estimate can ever be. From this it appears that the total revenue for the quarter was \$207,881.53, operating expenses \$149,993.76, taxes \$10,500, leaving income applicable to return \$47,387.77. The interest on funded debt was \$29,712.40, other interest and rent deductions \$15,246.33, making the net corporate income \$2,429.04. If these results fairly reflect what may be expected from the new rates, they do not indicate that a fair return will be realized.

No evidence has been presented as to the cost of furnishing service to commuters alone; and it is difficult to see how any such evidence could be given as they are comparatively few in number, and are carried on the same cars as are all other classes of passengers; and therefore in determining the fairness of the commuters' rate, resort must be had to another kind of evidence. Proof has been given of the commutation rates in force upon other electric interurban roads in the same vicinity, and while such evidence should be carefully scrutinized for the reason that operating conditions can hardly ever be the same on different roads (San Francisco R. R. Co., P. U. R. 1917 E, 546) it may be used in the absence of better proof. Most of these rates are con-

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structed on the principle of a lower mileage for the longer haul rather than a uniform rate per mile. On the Empire State railroad the commutation rate varies from one and fifteen-one-hundredths cents to one and twenty-one one-hundredths cents; on the Auburn and Syracuse railroad from one and six-one-hundredths cents to one and twenty-two one-hundredths cents; on the Syracuse and Northern railway from one and twenty-six one-hundredths cents to one and forty-one one-hundredths cents. The Syracuse and Suburban Railroad Company had no commutation fare, but issued a coupon ticket book, by the use of which on the commutation basis the rates would vary from one cent to one and one-quarter cents per mile. It is only fair to state that this company has now pending before the Commission a proceeding in which it seeks approval of a proposed new tariff schedule in which the commutation rate is placed at one and one-half cents per mile. We are also asked to make comparison with the rates on the New York Central railroad, a steam railroad operating in the same territory. These rates, since the increase effected by the order of the Director General of Railroads, range between .87 cents and 1.29 cents per mile. It appears, however, that the railroad stations in almost every case are situated a long distance from the business centers of the villages served and that practically no local train service is furnished, while the Rochester and Syracuse railroad runs directly through the business centers and furnishes hourly service. It is evident that such evidence is not very helpful. But the comparison between the rates of the Rochester and Syracuse and the other railroads mentioned does not show such a great disproportion as would justify a finding that they are for that reason unjust or unreasonable.

We are aware from the evidence in other cases now pending before us that there has been, and still continues to be, a great increase in the cost of labor and all kinds of materials used in the operation of electric railroads. The War Labor Board has recently materially increased the wages of employees of street railroads in the territory in which this road is located and in all probability it will be obliged to meet such increases, thereby greatly increasing operating costs. In view of all the circumstances we

think that we can hardly say that the rates complained of are unjust or unreasonable, and prefer to allow operation under them to continue for a sufficient length of time so that accurate data as to the effect of such operation may be available, and the complainants may then, if they are so advised, make an application to reopen the proceeding.

All concur, except Commissioner Barhite, not present.

In the Matter of the Complaint of the TRUSTEES OF THE INCORPORATED VILLAGE OF FALCONER, Chautauqua County, against PENNSYLVANIA GAS COMPANY as to Proposed Discontinuance of Furnishing Natural Gas in Said Village

Case No. 6435

(Public Service Commission, Second District, September 17, 1918)

A gas company should not be permitted to wholly shut off the supply of gas from a community — as to what classes of customers it may shut off from supply.

Power of the Commission to protect a community in its supply of fuel for heating and cooking.

The present proceeding was brought by the village of Falconer to restrain the Pennsylvania Gas Company from cutting off the supply of natural gas from that village. The company admits its intention to do so but defends its right to so elect. The company received its franchise from the village in 1899 and about all the buildings in Falconer, which is a village of almost 3,000 people, are now equipped with appliances for the use of natural gas. The company is a Pennsylvania corporation supplying several communities in that State and also supplies the city of Jamestown and the village of Falconer in this State. Practically Jamestown and Falconer are one municipality. Legally they are separate and distinct. There appears no intention to cut off or limit the supply in Jamestown and the only reason why Falconer is to be cut off is that it is the last municipality to which the gas company extended its mains. *Held*, that it cannot be presumed that when the franchise was granted to the gas company by the village of Falconer it was intended either by the village or by the gas company that the supply of gas might be peremptorily discontinued at any time. *Held*, also, that the gas company should not be permitted to wholly shut off the supply of gas from Falconer but may be permitted to shut off the supply from certain classes of customers and to limit the amounts supplied to others.

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Walter H. Edson, for the complainants.

Fisher & Fisher, for the respondent.

BARHITE, Commissioner.—This proceeding is instituted by the trustees of the village of Falconer for the purpose of restraining the Pennsylvania Gas Company, hereinafter called the Gas Company, from shutting off the supply of natural gas from that village. The respondent by its answer admits that it is its intention to shut off the supply of gas from the village on December 1, 1918. It is further admitted in the answer that the Gas Company received its franchise from the village on October 4, 1899, and that the buildings in said village have been equipped with appliances for the use of natural gas to the amount of several thousand dollars and that nearly all the inhabitants depend largely and many entirely upon gas furnished by respondent for heating, cooking, and lighting. The reason which respondent gives for its intended action is that it is unable to furnish a sufficient supply of gas for all its customers during severe winter weather. The Gas Company is a Pennsylvania corporation and supplies with gas several cities and villages in that State and brings its line across the State line into New York and supplies the city of Jamestown and the village of Falconer. In the year 1917 the Gas Company furnished to the city of Jamestown 1,664,805,000 cubic feet and to the village of Falconer 82,828,000 cubic feet. Practically Jamestown and Falconer are one municipality. Legally they are separate and distinct. Falconer lies to the east of Jamestown and the adjoining boundary lines of the two municipalities are coincident. The pavement on Second street in the city is continuous with the pavement on Main street in the village. The same street car system and the same water system serve both places. The business and the social relations of the two communities are intermingled. As a prominent citizen of the city expressed it, it is hard from an ordinary inspection of the vicinity to distinguish any dividing line between the city of Jamestown and the village of Falconer. The pipes of the Gas Company in the city are continued into the village and furnish the supply

for that locality. So far as appears from the record or has come to the knowledge of this Commission there is no intention to cut off or limit the supply in the city. The only reason given why Falconer is chosen for the sacrifice is that it is the last municipality to which the Gas Company extended its mains.

This Commission is well aware of the natural gas situation in western New York. It believes as the Gas Company contends that the supply of natural gas is failing and that extremely low pressures may result in danger to the customers. In previous memoranda and orders it has indicated its views. The Commission in nowise recedes from the position it has hitherto taken. That position does not contemplate the sudden shutting off of gas for every purpose from whole communities. It is based upon the necessity of shutting off certain classes of users during the period of small supply who originally were not considered as possible customers but who now burn gas on account of its cheapness and in enormous quantities. It is based upon a prevention of wastefulness among domestic consumers by causing careful methods in its use, and the disuse of furnaces and other appliances which do not develop the heating qualities of the gas to their full extent. It aims at preventing the extension of mains. The purpose of the Commission is the conservation of gas and not the total prevention of its use until the companies are willing to make arrangements to augment the natural product by the addition of sufficient of the manufactured article to supply the deficit. The city of Jamestown uses over twenty cubic feet of gas to every cubic foot used by the village of Falconer, and means adopted for the conservation of gas in what is one community is a much better way to solve the problem than to shut off the supply from a part and allow the rest to use the gas in an unrestricted manner.

The respondent sets up the plea that it is dealing with an article of interstate commerce and that consequently the State of New York has no control over its action except perhaps in safety matters. In other words, the respondent is inclined to admit that the State of New York has control over its actions in matters where the police powers of the State are involved. If the protection of a

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village of from 2,500 to 3,000 inhabitants in its supply of fuel for heating and cooking during the period of our rigorous northern climate is not a legitimate subject over which the police power of the State may be exercised it is quite apparent that the scope of these powers is extremely limited. Under the Public Service Commissions Law this Commission is given general jurisdiction over gas companies and by subdivision 5 of section 66 of that law it has power "to see that their property is maintained and operated for the security and accommodation of the public."

The status of the respondent as an agent of interstate commerce where the subject of rates is involved is now under consideration in the courts, and with the final decision both this Commission and the interested parties must be content. It may be interesting to observe, however, that the Gas Company and other companies which obtain their supply of gas wholly or in part beyond the State line seek the protection of the laws of the State of New York when they file their schedules of rates pursuant to the laws of this State. They depend upon the protection of these laws when they collect their bills, but when these rates or any proposed increased rates are attacked then they claim they are only subject to United States law.

The franchise granted to the Gas Company by the village of Falconer is not for any definite period of time and the Gas Company does not agree to supply the village for any certain number of years, but we have the right to infer that it was the intention of the parties that the contract should be of a permanent character.

It can not be presumed when we consider the subject of the agreement that it was intended either by the village or by the Gas Company that the supply of gas might be peremptorily discontinued at any time. At least a fair and reasonable notice was contemplated. It would not be presumed that the Gas Company would expend the sums to lay its pipes throughout the village and that the inhabitants would pipe their houses unless they had in view the permanent continuance of the service. The village contains about 800 houses, all or nearly all of which are fitted for the use of gas. What factories and business use the gas does not appear.

In *Booth v. Cleveland Mill Co.*, 74 N. Y. 15, 21, we find these words: "If from the text of an agreement and the language of the parties either in the body of the instrument or in the recital or references there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument or a promise if the instrument is unsealed for non-performance of which an action of covenant or assumpsit will lie." See also *New England Iron Co. v. Gilbert El. R. R. Co.*, 91 N. Y. 153.

In *Russell v. Allerton*, 108 N. Y. 288, it is held that when there is any doubt as to the meaning of a contract it will not be so construed as to place one party wholly at the mercy of another.

It should also be remembered that when an instrument in which the public has an interest is to be construed and there is any doubt as to the meaning, that construction must be in favor of the public.

The Gas Company should not be permitted to wholly shut off the supply of gas from Falconer, but may be permitted to shut off the supply from certain classes of customers, and to limit the amount supplied to others.

All concur, except Commissioner Cheney, not present.

In the Matter of the Complaint of the STATES METALS Co., INC., of Mellenville, Columbia County, against CHATHAM ELECTRIC LIGHT, HEAT AND POWER COMPANY, Asking that Three Phase Current be Furnished

Case No. 6451

(Public Service Commission, Second District, September 17, 1916)

Obligations laid upon a public service corporation by its certificate of incorporation and the granting to it by a Public Service Commission of the right to transact business in regard to meeting public demands for the product furnished by it.

The complaint herein is made by a chemical manufacturing company located at Mellenville, in the county of Columbia, N. Y., and engaged in the manufacture of sulphurette of antimony. This substance is used

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in compounding rubber for war purposes. The company also intends the production of other war material. The respondent, the Chatham Electric Light, Heat and Power Company, is a public utility corporation supplying electricity for those purposes in the locality where the complainant's plant is situated. The respondent now supplies single phase current for lighting purposes and for running small motors. The complainant desires to be furnished with three phase current, which is the standard for power purposes for general uses. The single phase current now furnished is insufficient to give the power needed by the complainant. *Held*, that the Commission has the power to order the required improvement; that the certificate of incorporation of a public service corporation and the permission granted to it by a Public Service Commission to transact business, not alone extend to it certain privileges, but impose upon it certain obligations, and one of those obligations is a readiness to respond, even at expense, to all reasonable demands for the product furnished by it.

Scott, Gerard & Bowers for complainant.

John C. Dardess, for respondent.

BAEHTE, Commissioner.—The complainant is a chemical manufacturing company located at Mellenville in the county of Columbia, N. Y. The plant has been recently purchased and already \$31,000 or \$32,000 has been spent in getting it ready for use. Ultimately it is expected that from \$75,000 to \$100,000 will be expended in improvements. It is the intention to operate for twenty-four hours continuously during the seven days of the week. Sulphurette of antimony is manufactured. This substance is used in compounding rubber, and is a product employed for war purposes. The company has in mind the production of other war material.

The respondent is a public utility corporation which exclusively supplies electricity for light, heat, and power in the locality where the plant of the complainant is situated. At the present time the respondent supplies only single phase current which is used for lighting and to run small motors. The complainant desires the respondent to furnish three phase current which is the standard for power purposes except possibly for small motors. The complainant is now using steam and a water power which will not furnish the required power for more than two hours in the fore-

noon and two hours in the afternoon. The single phase current now furnished by respondent is not sufficient if it were suitable to give the power needed by the complainant.

The complainant claims that its plant was bought after a contract had been made with the respondent company to furnish the electric current desired. This claim is disputed by the respondent, and I do not find sufficient evidence in the record to uphold the claim of the complainant. There is evidence that negotiations were had between the parties upon the subject of power, but these negotiations did not make a contract. The complainant also holds that the respondent should be required to furnish the power although no contract was made, as the situation warrants such direction on the part of the Commission. I am inclined to support this claim and to hold that the Commission has the power to order the required improvements. Section 65 of the Public Service Commissions Law provides: "Every electrical corporation * * * shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Section 66 provides that each Commission shall have power "to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities."

So long as the respondent remains the only source from which electric power can be obtained in a particular locality, it must expect to a reasonable extent to meet the demands for power in that locality. Its certificate of incorporation and its permission to transact business by the Public Service Commission, Second District, not only extended to it certain privileges, but imposed upon it certain obligations, and one of these obligations is a readiness to respond to all reasonable demands for light, heat, or power, and to make such additions or improvements as may be necessary to meet such demands. A public service corporation can not be permitted to dominate a certain locality, and then be allowed to say how far and to what extent it will render service.

The water power owned by the complainant is sufficient only

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to run its machinery for two hours in the forenoon and two hours in the afternoon. No hardship is to be imposed upon the power company as the complainant in its brief states it is willing to pay a fair and reasonable amount for the power it uses although such rate is in excess of the rate now charged, and is further willing to make a contract to take at least 9,000 kilowatt hours of energy per month. The complainant will further undertake to supply the necessary transformers to reduce the voltage from that at which it is supplied to the voltage required to run the plant.

The answer of the respondent is to the effect that the expense of the improvement is too great, and that the margin it would receive over the amount it pays for power is too small, taking into account the transformer losses and the line losses. The last contention noted may be well taken. Under its filed schedules the company makes a fair profit for the first 500 kilowatt hours per month. Beyond the first 500 kilowatt hours per month the rate is but slightly in excess of the amount paid. No opinion is expressed as to whether the published rate for over 500 kilowatt hours per month is sufficient to earn a fair amount for the power company. That matter, if necessary, can be determined at a later date and the complainant offers to pay whatever amount is fair and proper. The figures given by the experts called by the complainant and those of the respondent as to the cost of the improvement differ widely. The manager of the complainant states there are two ways by which the desired result can be reached. By one method an additional transformer could be placed at Chatham, and an additional wire run from Chatham to Mellenville. His estimate of the cost of this method is \$4,150. Another method is to place the transformer at Ghent and run the third wire from that place to Mellenville. The cost of the latter method was estimated to be \$3,344. Which would be the better method or the more expense to operate may well be left to the power company. The estimate of an outside electrician places the cost of construction with the necessary apparatus from Chatham to Mellenville to be \$3,962. The president, treasurer, and general manager of the power company stated that it would cost

approximately \$7,423 to meet the requirements of the complainant. This figure however includes the transformer at the mill, which complainant is willing to furnish. In a letter written to the complainant by this witness it was stated that the cost would be between \$4,500 and \$5,000 and it would seem from the evidence that the cost would be nearer to those amounts than that stated in the answer of the respondent. It is practically conceded by the respondent that the present current will not be sufficient for the present and the future needs of the complainant; the line should not be loaded with motors large enough to do the work. It follows that if the complainant is willing to make the concessions stated in its brief that the respondent should make the required improvements.

All concur, except Commissioner Cheney, not present.

Petition of COHOES POWER AND LIGHT CORPORATION, COHOES COMPANY, and COHOES GAS LIGHT COMPANY for Authority to Transfer Properties, etc., to Make a Mortgage for \$5,000,000, to Issue now \$2,500,000 of 6 per cent ten-year Gold Bonds and \$2,500,000 Common Capital Stock

Case No. 5806

(Public Service Commission, Second District, September 19, 1918)

Permission granted to a light and power corporation to make and execute a mortgage and to issue now certain gold bonds and common capital stock.

In November, 1916, the Cohoes Power and Light Corporation was organized under the Transportation Corporations Law with an authorized capital stock of \$5,000,000. As regards operations the company is still an embryo as it has not yet begun operations and none of its stock has yet been issued nor has it incurred any obligations. It was organized to acquire the plants, properties, water rights and franchises of two existing domestic corporations, the Cohoes Company and the Cohoes Gas Light Company. The Cohoes Company was established by a special act known as chapter 90 of the Laws of 1826, and since 1831 has maintained a dam across the Mohawk river above the great Cohoes Falls,

together with a system of canals for the development of hydraulic power. It also owns lands on both sides of the Mohawk river which enable it as a riparian owner to use the waters of that river and also other adjacent lands upon which manufacturers under leases have contracted and operated many industrial plants. The Cohoes Gas Light Company is a domestic public lighting corporation organized in 1852 to manufacture and distribute gas for lighting purposes and distribute electricity for light, heat and power purposes in the city of Cohoes and surrounding towns. The relations of these two companies have been most intimate for over sixty years. The purpose of consolidating both these corporations by transferring them to the Cohoes Power and Light Corporation is to make possible the substitution of the old system of applying the water through canals directly to the wheels and machinery and substitute for that system a central modern hydro-electric plant which would generate electric current for the hydraulic power in one plant and distribute the current to the various users. Upon the petition, the appraisal of the physical property involved, the condensed summary of fixed capital expenditures and values of land and water rights heretofore filed, and upon the facts adduced at the hearing held July 10, 1918, the reports of the division of capitalization dated May 28, 1917, and July 3, 1918, and the reports of the division of light, heat and power dated July 19, 1917, and May 1, 1918, the petition of the Cohoes Power and Light Corporation was granted, and it was authorized to execute and deliver to the Central Union Trust Company of New York, as trustee, a trust mortgage upon all its plant and property, with the usual restrictions, and to issue its bonds under this indenture for an amount not exceeding \$2,500,000, to bear not over 6 per cent interest per annum, and to now dispose of not more than \$2,500,000 face amount of bonds at not less than their face value; also to issue an equal amount of its common capital stock at par, to be disposed of at not less than the par value thereof, the proceeds of the sale of such securities to be used exclusively for the acquisition of the properties, franchises, rights, etc., of the Cohoes Company and the Cohoes Gas Light Company, free and clear of all incumbrances and claims except certain small miscellaneous liabilities. *Held*, that the allowance of \$691,277.09 for "risk over and above actual cost" and for "purchaser's effort and outlay in consultation and supervision over a period of six years" is not exorbitant and can be reasonably made.

Petition filed December 4, 1916.

Appraisal of physical property, etc., of Cohoes Gas Light Company as of April 30, 1916, filed December 11, 1916.

Condensed summary of fixed capital expenditures and valuation of land and water rights as of September 30, 1916, of Cohoes Company filed December 11, 1916.

Hearing held July 10, 1918.

Reports of division of capitalization dated May 28, 1917, and July 3, 1918.

Reports of division of light, heat and power dated July 19, 1917, and May 1, 1918.

BY THE COMMISSION.— The Cohoes Power and Light Corporation is a domestic corporation organized in November, 1916, under the Transportation Corporations Law, with an authorized capital stock of \$5,000,000. The company has not yet begun operations, and none of its stock has yet been issued, nor has it incurred any obligations. The purpose of its organization was the acquisition by it of the plants, properties, water rights, and franchises of two existing domestic corporations, namely, Cohoes Company and Cohoes Gas Light Company. The Cohoes Company was created a corporation by special act of the Legislature of the State of New York known as chapter 90 of the Laws of 1826, pursuant to the authority of which it completed in 1831 and has ever since maintained a dam across the Mohawk river above the great Cohoes Falls, together with a system of canals for the development of hydraulic power; it also purchased and still owns the lands on both sides of the Mohawk river which entitle it to use the waters thereof as riparian owners, and other adjacent lands upon which manufacturers under long term leases covering both the land and the right to the use of water have constructed and operated large and important manufacturing plants such as iron foundries, knitting mills, axe factories, cotton mills, hosiery mills, rolling mills, and other industries. The practice has been to make a 999-year lease of the land, granting to the lessee also the use of a specified amount of water from the canal system.

The Cohoes Gas Light Company is a domestic public lighting corporation, organized in 1852, engaged in the business of manufacturing and distributing gas for lighting purposes, and in the distribution of electricity for light, heat, and power purposes in the city of Cohoes and surrounding towns. For more than sixty years these two companies have operated in the same territory

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and are closely affiliated, the majority of the capital stock of each being under a common ownership and control. Both generating stations of the lighting company are located on lands of the Cohoes Company and have been operated by water power furnished from its canals. It is obvious that on the completion of the substitution of electric energy for water power a much more satisfactory service can be rendered to the patrons of the lighting company by reason of the greater steadiness and continuity of the power supply aside from the more important economic advantages which will be secured.

In the year 1911 Mr. Anthony N. Brady conceived the idea of acquiring the two properties, discontinuing the application of the water through canals directly to the wheels and machinery, and substituting for the old system a central modern hydro-electric plant which would generate electric current for the hydraulic power in one plant, and distribute the current to the various users. It was estimated that running with a load factor of 40 per cent, the available water with a necessary steam auxiliary was capable of generating in the modern plant 78,840,000 kilowatt hours per year, of which 30,000,000 kilowatt hours would do the work which the entire development had been doing under the old methods and do it better, leaving the remainder for use in other directions.

The plan was carried out through the purchase by Mr. Brady, and after his death by his estate, of substantially all of the stock of the two companies, viz.: 11,876.8 shares of \$100 each out of a total of 12,000 shares of the Cohoes Company, and 8,750 out of a total of 10,000 shares of the lighting company. These purchases were made for cash in the open market without commissions or brokerage. The cost of the Cohoes stock, including compound interest at 6 per cent per annum on the outlay from dates of purchase to December 31, 1917, and deducting dividends, has been \$1,864,162.13, and the cost of the entire 12,000 shares upon this basis would be \$1,883,498.40; computed in the same way, the cost of the lighting company shares has been \$710,828.01, and the cost of the entire 10,000 shares upon this basis would be \$812,375.

The enterprise was then vigorously prosecuted to completion, and seems to have met the expectations of its owners. The control of the water which had been parted with under the long term leases, about thirty-one in number, has been secured by negotiations with the lessees through which their water rights were surrendered in consideration of what was considered by the parties an equivalent supply of electric energy. The monetary return from this current, viz.: a total of about 27,000,000 kilowatt hours per year, is about one-half cent per kilowatt hour, leaving about 40,000,000 kilowatt hours per year for disposition elsewhere.

The new plant was constructed by the Cohoes Company itself without the interposition of construction contracts, commission men, or brokers, all costs being paid in cash as they were incurred. These payments were made either out of net earnings which were not distributed as dividends or out of advances which the Brady estate made to the company between January 1, 1912, and December 31, 1917, to the amount of \$1,122,987.32. The acquisition of the stocks above mentioned took place at a time when there was an outstanding mortgage indebtedness against the property in the amount of \$350,000 which was assumed by the purchasers and is to be retired, thus increasing the investment by that amount.

In addition there was expended by the lighting company during the five-year period mentioned in replacing apparatus used by consumers, which should properly be credited as an item of development cost incident to the new hydro-electric installation, the sum of \$40,000, while a bill for \$24,000 covering legal services over a period of years will be paid by the owners of the stocks of the old companies. There is also found to exist an excess of floating assets at December 31, 1917, over like assets December 31, 1911, amounting to \$81,017.48.

Assuming that the few minority shares of stock in the old companies are of equal proportionate value with those which were acquired, we thus have the equivalent of a total cash investment in the property by the present owners as of December 31, 1917, of \$4,313,878.20, as against which there are liabilities to be assumed of \$5,155.29.

The newly organized Cohoes Power and Light Corporation now proposes to take over all the property and franchises of the two older corporations as of the date last named, free of all indebtedness except the floating debt of \$5,155.29, and to pay therefor the sum of \$5,000,000 in its own securities, viz.: \$2,500,000 of its first mortgage ten-year 6 per cent bonds at par, and \$2,500,000 of its common capital stock.

There would seem to be no doubt of the wisdom and desirability of the development which has been made; antiquated methods of developing, applying, and distributing hydraulic power have been superseded by new and much more productive methods, and a substantial addition to the power output of the property has been accomplished, it appearing that the output of energy from the available water has been more than doubled. It is necessary to consider, however, whether or not the property proposed to be acquired by the new company is fairly and reasonably worth the amount proposed to be paid for it. It will be observed that the investment shown above represents in part actual cash cost of physical property, and for the remainder what may be considered the market value of physical property, franchises, and good will, because the stocks purchased in the market were the equivalents of those items. This market cost, however, included certain property which will not be used or useful in the public service, and also included the franchise of the lighting company. The Commission has therefore examined the books and records of the old companies, which disclose that as of the date mentioned the actual cash cost of all of the assets has been \$3,516,142.21. These records run back nearly 100 years, however, and while they were remarkably well kept for the times, certain substantial items of cost which would be reflected today in a set of records which has kept abreast of the advance in accounting science are missing. Among these cost factors may be mentioned organization, engineering and superintendence, law expense, interest and taxes during construction, and miscellaneous construction expenditures. A large part of these cost figures would seem to have little bearing on the question of value, however, by reason of their great antiquity, and

undoubtedly many of the most important items reflect but a fraction of present values. Neither does it seem worth while to insist upon an expert valuation of the physical property involved, for the reason that any such valuation would be largely based upon individual conjecture as to the water power upon its earning capacity and as to the whole property upon a comparison with what other like properties may have cost, the latter basis eventually going back in large measure again to the earning power. The Commission has all the evidence which can be produced as to the earning power, and can itself apply that measure of value to the degree that it is proper to give it consideration.

The examination made by the Commission discloses that approximately \$1,000,000 of the original cost of the physical property is represented by property which has been superseded in the new development, and will not be used or useful in the public service. It was necessary to take and pay for it, however, in order to acquire the old plants, and while it will be superseded it does not follow that it is valueless because in part it consists of canals and other real property which may prove eventually to be of substantial value. We think it only fair to consider also that the property was acquired and the new development made during a period when much lower prices prevailed than are current today. Applying the test of earning power, we find the present companies have an actual experience of six months ended June 30, 1918, with the modern plant. These earnings are based on moderate prices for the output, viz.: for electric lighting seven and one-half cents maximum per kilowatt hour; for gas \$1 per 1,000 cubic feet maximum; for power one-half cent per kilowatt hour, and (estimated) one cent per kilowatt hour. These figures, with a 45 per cent operating expense, show total net earnings of \$425,-029.28, equal to approximately eight and one-half per cent on the proposed purchase price.

Following this scrutiny of the proposition, the Commission is satisfied that the expenditure of \$4,313,878.20 was necessary for the accomplishment of the project, and that except for the superseded property the expenditure represents at least the equivalent

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which it would have cost to purchase the physical property at the time the conversion took place, and before the present era of unusually high costs; by the adoption of these figures no franchise will be capitalized contrary to the statute. In opening the books of the new company the item of \$1,000,000 representing superseded property should be set up as intangible capital and should be treated as such in the future financial transactions of the company.

There is a request in the petition that we allow a compensation for "risk over and above actual cost" of \$323,504, and for "purchaser's effort and outlay in consultation and supervision over a period of six years" of \$404,000. If we allow for these two items \$691,277.09, the desired capitalization will be made up. It is fair to consider that the development has demanded and received, over the period named, a large expenditure of foresight, judgment, skill, and application on the part of the owners which is not included in any of the figures representing actual cash outlay. The difference between the actual investment and the \$5,000,000 asked is about 16 per cent of the actual cash. The evidence shows that a commendable practice was followed by eliminating contractors' profits, commissions, bonuses; and by the payment for materials and services on a strictly cash basis. It appeared also that the engineering and financial organizations of the Brady estate were freely drawn on for their services during the entire period of construction for which no charge was made. Considering the entire circumstances, the period of time consumed and the character of the development, we feel that an allowance of \$691,277.09 is not exorbitant and can reasonably be made.

In accordance with the foregoing opinion the Commission, on the same day, made the following order:

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Cohoes Company and the Cohoes Gas Light Company are hereby authorized to transfer all of their properties,

franchises, rights, etc., free and clear of all incumbrances and claims except certain miscellaneous liabilities aggregating \$5,155.29, to the Cohoes Power and Light Corporation for the sum of \$5,000,000 as of January 1, 1918; provided that the amount of all of such assets at the actual date of the transfer to the latter company shall not be less than their amount at December 31, 1917, as set forth in the reports of the Commission's division filed in the case; and this Commission hereby permits and approves the transfer to and acquisition by the Cohoes Power and Light Corporation of such properties, franchises, rights, etc., of the Cohoes Company and Cohoes Gas Light Company upon these terms.

2. That the Cohoes Power and Light Corporation is hereby authorized to execute and deliver to the Central Union Trust Company of New York, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or mortgage upon all its plant and property, dated the 1st day of January, 1918, the form and terms of which indenture shall be hereafter presented to and approved by this Commission, and the company shall have no right or authority to issue any bonds to be secured thereby until such approval of this Commission shall have been secured.

3. That the Cohoes Power and Light Corporation is hereby authorized to issue its bonds under this indenture up to an amount not exceeding \$2,500,000, said bonds to be known as series A bonds running for ten years from January 1, 1918, and bearing interest at not more than 6 per cent per annum; provided that no bonds shall be issued until the mortgage securing said bonds shall have been presented to and approved by the Commission as provided for in ordering clause 2 herein.

4. Subject to the conditions set forth in ordering clauses 2 and 3 herein said \$2,500,000 face amount of bonds may be disposed of at a price not less than their face value to realize proceeds of at least that sum.

5. That the Cohoes Power and Light Corporation is hereby authorized to issue \$2,500,000 par value of its common capital

stock which may be disposed of at a price not less than the par value thereof to realize net proceeds of at least that sum.

6. That said securities, or the proceeds thereof, which shall not be less than \$5,000,000, shall be used solely and exclusively for the acquisition of the properties, franchises, rights, etc., of the Cohoes Company and the Cohoes Gas Light Company, free and clear of all incumbrances and claims except certain miscellaneous liabilities aggregating \$5,155.29.

7. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Cohoes Power and Light Corporation unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

8. That the Cohoes Power and Light Corporation shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report which shall show:

(a) What securities have been sold, exchanged or otherwise disposed of during such period.

(b) The dates of such sales or disposition.

(c) To whom such sales were made.

(d) What proceeds, if any, were realized from such sales.

(e) Any other terms and conditions of such transactions.

(f) With respect to ordering clause 6 of this order there shall be shown the amount of the securities herein authorized, or their proceeds, which has been used for the purpose specified therein.

Such reports shall continue to be filed until all of said securities shall have been sold and the proceeds used in accordance with the authority contained herein, and if during any period no securities were sold or proceeds used, the report shall set forth such fact.

9. That within two months after the transfers herein authorized have been made, detailed statements, duly verified by the secretary or other executive officer of the Cohoes Power and Light Corporation, shall be filed with the Commission which shall include:

(a) Particulars of the journal entries made upon the books of

the Cohoes Power and Light Corporation reflecting the acquisition of the properties herein authorized to be transferred to it.

(b) A detailed allocation of the cost to the Cohoes Power and Light Corporation of the properties acquired from the Cohoes Company and Cohoes Gas Light Company, pursuant to the authority herein granted, which details shall be subdivided in such manner as to show the charges and credits to the various accounts at January 1, 1918; and this case shall remain open upon the records of the Commission until it has formally approved the manner in which the acquisition of this property has been recorded upon the books of the Cohoes Power and Light Corporation.

10. That the Cohoes Company and the Cohoes Gas Light Company shall, within a reasonable time after the consummation of the transfers approved in this order, file with the Commission all such annual or other periodic reports as the Commission may be required by law to obtain, or which it is empowered by law to exact and shall require, concerning its operations and financial or corporate transactions during the period subsequent to the date of such report last filed and prior to the effective date for accounting purposes of the transfers hereby approved.

11. That the authority contained in this order to issue securities is upon the express condition that the petitioners accept and agree to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days of the service hereof the said companies shall file with the Commission a satisfactory verified stipulation over the signatures of their presidents and secretaries accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Finally, it is determined and stated, That in the opinion of the Commission the securities herein authorized and the money to be procured by the issues thereof are reasonably required for the purpose specified in this order and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.

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Public Service Commission, Second District

**In the Matter of the Complaint of HORSEHEADS TRANSPORTATION
PROTECTIVE ASSOCIATION et al. against ELMIRA WATER, LIGHT
AND RAILROAD COMPANY as to Proposed Increased Fare**

Case No. 6471

(Public Service Commission, Second District, September 19, 1919)

Investigation as to whether a public service corporation needs additional income from increased trolley rates to enable it to render satisfactory service to the public and as to whether the rate proposed is unjustly discriminatory.

The Elmira Water, Light and Railroad Company proposes an increase of one cent in its trolley fares beyond the city limits of Elmira. The present rate in Elmira, which includes Elmira Heights, Southport Corners, Clark's Glen and Center Mills, is five cents, a flat rate which has become established. The Elmira-Horseheads traffic is suburban and so is the Elmira Heights-Elmira traffic, except for those passengers on both lines who live just beyond the city limits, of whom there are comparatively few. The character of the other lines interested stated in detail. Two questions are involved in the present case; does the company need additional income from increased trolley rates to enable it to render satisfactory service, and is there unjust discrimination in the proposed increased rates. *Held*, that where a long-established city flat rate of five cents has been in operation in a city and its outlying districts, suburban and interurban in character, a proposed schedule increasing rates, using the city line regardless of distance or population as a zone boundary, may be unjustly discriminatory.

A zone system allowed which includes the immediately suburban districts in the flat city rate and increases rates to and from the districts interurban in character.

Mortimer L. Sullivan, for complainants and town of Southport.

Thomas A. Wickham, for residents of the town of Elmira.

H. L. Gardner, for Business Men's Association of Elmira Heights and for the town of Veteran.

Stanchfield, Lovell, Falck & Sayles (by Ross M. Lovell), and M. G. Bogue, for respondent.

FENNELL, Commissioner.—There are two vital questions in this matter. Does the company need additional income from increased

trolley rates to enable it to render satisfactory service? Is there unjust discrimination in the proposed increased rates?

The question of necessity can best be answered by stating what the company is legally entitled to receive from its railroad operations, and then stating what it is actually receiving from such operations.

A public utilities company is entitled to receive a fair return on the value of the property used in the public service, making due allowance for the natural "wearing out" of the property and obsolescence. To keep a trolley system fit for good service requires that a sum be set aside from earnings each year with which to meet these two factors of destruction as the years go by. Without such a policy adopted and sanely applied the final physical and, therefore, financial wrecking become as certain as the result of a definite mathematical problem. A depreciation reserve must be created to care for and balance such depreciation. The rates for service must carry this annual charge, just as such rates should also carry an annual return to the owners of the property used in the public service. The public in paying rates is not to pay enough to make a fair return on the capitalization of a company but on the actual value of the property used. This value may be found by appraisal. It may be determined also by the actual investment in the property: that is, the legitimate cost of the property. The records of the Public Service Commission (Cases Nos. 4212 and 5357, June, 1916) show a detailed inventory and appraisal made by the company and checked by the Commission's engineers and accountants. These figures not having been questioned, they may for the purposes of this case fairly be used as investment cost.

The total for the entire physical property of this company is \$6,053,759. The amount assigned to the railroad department, \$1,911,476, does not include any part of an allowance of \$1,000,000 for intangible capital undistributed between departments which is included in that total. The accrued depreciation of the railroad property, as agreed upon in Case No. 5357 and as modified by transactions since that time, June, 1916, is \$291,072. Deducting this from the railroad investment gives \$1,728,645.

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The following tabulation shows the condition of the railroad department of the company as of May 31, 1918:

ELMIRA WATER, LIGHT AND RAILROAD COMPANY

	All depart- ments	Railroad departments
Fixed capital December 31, 1917, as per company's report to Public Serv- ice Commission	\$6,053,759	\$1,911,476
Working capital (materials and sup- plies, and cash) December 31, 1917, as per company's report to Public Service Commission	111,569	.....
Railroad department's proportion of working capital, assuming the same ratio as for fixed capital, about 32 per cent .....	.....	35,231
Railroad investment, fixed and floating capital .....	.....	\$1,946,707
Depreciation reserve on railroad prop- erty December 31, 1917.....	.....	291,072
Possible rate base.....	.....	\$1,655,635
Railroad revenues year ended May 31, 1918 .....	.....	\$470,369
Railroad expenses year ended May 31, 1918 .....	.....	387,214
Railroad operating income year ended May 31, 1918 (Case No. 6471, re- spondent's exhibit No. 5).....	.....	\$83,155
Rate of return on above rate base.....	.....	5.02%
Bonded debt December 31, 1917.....	\$3,951,000	.....
Railroad department's proportion of bonded debt, in ratio of fixed capital investment, 32 per cent.....	\$1,264,320

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	All depart- ments	Railroad departments
Five per cent interest on bonded debt.		\$63,216
Available for dividends, surplus, or other purposes (\$83,155 — \$63,216)		19,939
Capital stock December 31, 1917.....	\$3,600,000	.....
Railroad department's proportion of capital stock in ratio of fixed capital investment 32 per cent.....	.....	1,152,000
Ratio of amount of railroad income available for dividends, surplus, etc., to capital stock apportioned to rail- road department .....	.....	1.73%

Company's Exhibit No. 5 in this case contains the following estimates:

ADDITIONAL REVENUE, ESTIMATED

As Result One-Cent Increase

Estimated additional revenue as follows:

Elmira Heights and Horseheads, Horseheads division	\$3,440
Elmira Heights and Horseheads, Elmira Heights divi- sion	4,560
West Water street and Roricks.	5,677
Pennsylvania avenue, Southport.	920

\$14,597

Seneca Lake division.	9,213
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\$23,810

Expenses to be met:

Increased fuel cost.	\$17,000
Increased labor cost.	14,575
Increased taxes, franchise.	1,200

\$32,775

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It will thus be seen that the company estimates that its increased expenses will be greater than its increased earnings by \$8,965. Deducting this amount from \$19,939, the amount available as of May 31, 1918, for dividends, surplus, etc., we find a balance of only \$10,974 as the profits of this company out of its investment in railroad property and its operation of the same. Even if the company's estimate of additional return from the one-cent increase is low and its estimate of increased expenses is high the amount of margin is so small that, with the present tendency towards steadily mounting costs and the probability of a continuance of cost increase, the margin will in all probability be entirely wiped out.

There should be considerable difference in the handling of cases where companies are endeavoring to obtain a "fair return" and cases where they are endeavoring to meet their fixed charges and maintain service without asking for any return in the form of dividends.

It is true that utilities companies must expect to share the unusual burdens of these emergency war times, but the public must remember that "sharing the burden" does not mean that the utilities companies should carry it alone by operating below cost. Transportation and other public utilities are vital to the people; more so in these times than ever before. They must not be permitted to break down; they must be kept on their feet; returns must equal costs. Public utilities perform part of the public service and therefore must be kept intact and in operation for the public benefit. "Sharing the burden" will probably mean higher rates to the public and lower profits or no profits to the companies.

Of course it must be understood that rates fixed under these emergency conditions, and without the usual long contested and expensive rate case appraisal and carefully investigated conditions, are fixed for not longer than the period of the war and are subject also to change in the meantime by order of the Commission upon proof of changed conditions.

It is contended that the proposed increase of one cent beyond

the city limits of Elmira is unjustly discriminatory against those living beyond the city limits because it increases only those beyond and not those within.

The answer to the question of unjust discrimination should be found in the rights of travel which a passenger receives upon payment of his fare rather than the distances actually traveled on various car lines from the end of the lines to the common center of traffic.

Rates are divided into two general classifications: one based upon mileage, the other a flat rate usually of five cents within the boundaries of municipalities and their immediate suburbs. The rate is to be paid for a long or a short haul; but the passenger has the right upon payment of his fare to take the long haul. Of course, strictly speaking, this is clearly inequitable to the railroad company as well as to the passenger. In large cities one person travels ten miles for five cents on the same car that a fellow passenger travels ten blocks for the same fare. It is clear that the ten-mile passenger has been carried below cost by the company and the company has carried the ten-block passenger at greater than a fair profit. But it has been found from experience in the development of the traffic systems of the various municipalities that the flat rate for municipalities works out in the long run to the greatest good for the greatest number. Such a flat rate tends to prevent overcrowding in the thickly populated centers of the city and to spread the people toward the outer edges and into the nearer suburban districts. This condition is beneficial for the whole community, both on the economic and the civic side. It prevents congestion of population in those districts of the city where closely crowded buildings, including commercial and industrial establishments, make necessarily for unpleasant, unhealthful, and uneconomic living. The cheap fare for the long haul permits men who work in the thickly built up portions of cities to have their homes in the outlying districts where living conditions are much better for their families and where land is not so valuable as to preclude their having enough of it in connection with their homes to have gardens, and thus help reduce

their cost of living. This condition is made possible only by the low fare for the long haul, and while this is apparently inequitable to the railroad for the long haul and to the short haul passenger, nevertheless it has brought about a tremendous step in advance in the living conditions in American cities, and has become a well established and satisfactory custom.

Trolley service is absolutely necessary in a modern city. If the trolley fares were measured by the distance traveled, the natural result would be an endeavor on the part of trolley users to keep as close to the center of the municipality as possible to save the considerable monthly expense caused by the increased rates in the outer districts, which increased rates for a whole family would be very considerable. This would lead to congestion in population and higher rents in the congested center. Another effect would be the curtailment of the use of trolley lines in the outer parts of the city and the consequent limitation of extension of lines. These results would be interwoven with each other and both would be bad.

This theory of the small fare for the long haul, balanced by the same fare for the very short haul, usually does not apply to interurban lines except in those portions which are immediately suburban. Where the passenger goes by trolley from one community to another there is not the same reason for the low fare for the long haul as where he goes from his work in the center of a given community to his home in a suburb and returns therefrom to his work. Suburban travel enlarges the size of a community and helps bring about benefits above indicated whereas interurban travel, from one community to another, has no such effect. Therefore, there is not the same reason to have the short haul pay the flat rate for the benefit of the interurban passenger that there is for the benefit of the suburban passenger.

And of course there must be some limitation as to the length of the long haul even when it reaches to the suburban district. This limitation will vary with every community and its particular traffic problems which have to do with distances, grades, population, etc.

Now if we assume, for the sake of argument, that the present five-cent rate in Elmira, which includes Elmira Heights, Southport Corners, Clark's Glen, and Center Mills is the kind of flat rate which has become established as above mentioned, and that the localities it serves are of the nature above described, then any increase such as proposed might be regarded as unjustly discriminatory. However, it can hardly be claimed that the Elmira-Horseheads traffic is suburban. It is rather interurban, which is also true of the Elmira Heights-Elmira traffic except for those passengers on both lines who live just beyond the city limits, of whom there are comparatively few.

The West Water Street line has the suburban and interurban characteristics. Quite a number of people live near the city line, but the trolley service reaches all the way to Rorick's Glen and Clark's Glen, a considerable distance beyond the city suburban district. The service is not only for the suburbanites who would be served by a short line running out from the city, but the service must necessarily be maintained clear through to the end of the line, and it might reasonably be said that the service near the far end of the line ought not to be charged against the city of Elmira as being really suburban to it. There might well be a line of division between a five-cent and six-cent zone farther west on Water street than the city line, which would place in the city five-cent zone the residents who are immediately suburban to the city.

The Southport Corners line is also more nearly suburban in character; it is a short line, extending only 2,200 feet beyond the city limits.

The discrimination against the traffic outside the city limits is more apparent than real. The city passenger pays five cents for a ride anywhere inside the city, with transfer rights to take him from any part of the city to any other part. The passenger may use only one line to the common traffic center, but he has the right to transfer at that point to any other part of the city, and the company must maintain regular service on all its lines at all traffic times to meet the requirements of passengers, whether transferees or otherwise, and whether or not the lines are used. The passengers

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from Elmira Heights, Horseheads, Rorick's Glen, or Clark's Glen get exactly the same rights as the city passengers in the city, and in addition the haul between their communities and the city and its immediately suburban districts. The additional hauls are by the proposed rate made for one cent. This is not regarded as unjustly discriminatory in view of the nature and length of the extra hauls.

The proposed increase of one cent on the Horseheads, Elmira Heights, Rorick's Glen, and Clarks' Glen routes is reasonable and should be allowed.

The Southport Corners line and that portion of the West Water Street line immediately suburban to the city should for the reasons above mentioned and because of the short haul to the business center be treated as portions of the city lines and have the same rate.

The short distance on the Elmira Heights line between the corporate limits of the city of Elmira and the corporate limits of the village of Elmira Heights should be included in the five-cent city zone.

The six-cent rate between Elmira and Elmira Heights on the Elmira Heights line should be balanced by a six-cent rate instead of an eleven-cent rate on the Horseheads line between Elmira and some point about opposite 14th street.

This opinion is accompanied by an order setting forth a tentative schedule and providing that a new rate schedule conforming substantially to the one suggested may be filed and become effective on short notice.

All concur, except Commissioner Cheney, not present.

Petition (or Complaint) of SYRACUSE AND SUBURBAN RAILROAD COMPANY under Subdivision 1, Section 49, Public Service Commissions Law, for Permission to Increase Fares

Case No. 6523

(Public Service Commission, Second District, October 1, 1918)

Permission granted to a public service corporation to increase fares.

The Syracuse and Suburban Railroad Company is a public service corporation operating a suburban road from about the center of the city of Syracuse through several villages to the terminus of the road at Edwards Falls, a little beyond the village of Manlius, having a branch extending between a village on the line to a neighboring hamlet, the total mileage of the road being about fifteen miles. The petition of the railroad shows that the present rates and fares charged by it were insufficient to yield a reasonable compensation for the services rendered, and are unjustly low and do not allow a sufficient average return upon the value of the property actually used in the public service after providing for surplus and contingencies. Upon all the facts adduced upon the record and upon a hearing, *held*, that the contention of the Syracuse and Suburban Railroad Company as to the inadequacy of the present rates is sustained; also *held*, that when it appears that the probable revenue to be derived from an increased rate schedule proposed to meet conditions arising out of the present war will not more than meet increased operating expenses and fixed charges, it is not necessary that a careful valuation of the property used in furnishing the service should be made; it is sufficient for the purpose of determining the application that it appears that the value of the property is at least equal to the amount upon which the fixed charges are calculated.

Such a valuation is not to be considered as a precedent in any future rate case involving the same property.

Gannon, Spencer & Michell, for the petitioner.

Stewart F. Hancock, Corporation Counsel, for city of Syracuse.

William L. Huber, in person.

Theodore L. Poole, for himself and other residents of the town of De Witt.

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CHENEY, Commissioner.—The petitioner in this matter operates a suburban road from about the center of the city of Syracuse to and through the incorporated villages of Fayetteville and Manlius to the terminus of the road at Edwards Falls, a mile or so beyond Manlius village. A branch of the road extends from the hamlet of De Witt to the hamlet of Jamesville, the total mileage being about fifteen miles. But little of the business done is city business, as the territory served in the city also has the service of the local lines with transfer privileges, and the competitive line does the greater share of the business. Practically no local riding is done in either of the villages of Fayetteville or Manlius, although the residents of those villages use the road for the longer distances. The character of its business indicates that its tariff schedules should be built upon the interurban basis rather than upon the urban, but in view of the fact that considerable of the mileage is located in the city and those villages, section 181 of the Railroad Law prescribing the maximum of rates in cities and villages must be complied with unless otherwise ordered by the Commission.

Accordingly the railroad company presented its complaint alleging that the rates, fares, and charges charged by it are insufficient to yield a reasonable compensation for the service rendered, and are unjust and unreasonably low, and do not allow a sufficient average return upon the value of the property actually used in the public service after providing for surplus and contingencies; and asks that notwithstanding the provisions of section 181 of the Railroad Law the Commission determine the just and reasonable rates, fares, and charges in force, and permit an increase in the rate of fare charged by the petitioner in cities and incorporated villages above five cents.

An examination of the different municipal consents under which the petitioner operates discloses that none of them attempt to fix rates of fare. The city of Syracuse was represented at the hearing, but none of the other municipalities appeared although due notice was given. Certain patrons of the road appeared at the hearing but made no objection to the proposed schedule of increased rates.

The evidence shows that the operating revenues of the company for the year 1917 amounted to \$151,167 and the operating expenses \$98,168. Included in these expenses was only the sum of \$3,020.75 to provide for depreciation during the year, which is manifestly an inadequate sum when consideration is had of the amount of property actually used in the service. The taxes paid were \$11,753, leaving total operating income of \$41,246. To this should be added the total non-operating income \$72, making gross income \$41,318. The interest on funded debt was \$27,650, other interest and rent deductions \$7,738, leaving a net corporate income for the year of \$5,930. It also appears that the operating expenses for the year 1918 will be very largely in excess of those of the year 1917. Increases in wages of its operators already granted and promised amount to \$9,900, and the increased cost of operation by reason of the high prices of materials will be from \$4,000 to \$5,000. The record of operation for the first six months of the year 1918 shows that the travel has fallen off and there is no reasonable expectation that the income from operation for the year 1918 will equal that of the year 1917. The company has not in the past been in receipt of an undue revenue as the record of dividends paid shows an average rate of but .67 per cent for the whole twenty years the road has been in existence, and the corporate surplus at the end of the year 1917 amounted to but \$45,000. Upon this showing it is evident that an increase in revenue is absolutely required in order to enable the company to meet the increased operating expenses to which it will be subjected in the present year.

The petitioner has presented with its petition a proposed tariff which it asks to have approved as the rates and charges to be charged by it and which is based upon a rate of three cents per mile for cash fares, two and one-half cents per mile for ticket fares, two cents per mile for mileage book rate, with a minimum fare of six cents for each class, and one and one-half cents per mile for commutation rates. A computation of probable revenue to be derived from the new tariff, based upon the assumption that the travel in the future will remain the same as the travel for

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the year 1917, has been submitted. This computation shows a total possible increase in revenue from the proposed rates of \$24,000. It is not probable that the travel will increase or even remain the same as in the past. The records of the company for the first half of 1918 with the present rates in force show a falling off in travel to a considerable extent, and it is probable that this company will experience the same result as have other companies which have put increased rates in force, which is that the volume of traffic will decrease so that the income return will not be in direct proportion to the rate increase. The company estimates that it will realize about 60 per cent of the maximum, or a total increase of \$14,000. From the evidence before the Commission in other cases, and the knowledge which it has of the results realized from increased fares in other localities, it would seem that this assumption is a reasonable one, and that no greater increase of revenue can be expected should the proposed tariff be put in force. The increases in operating expenses already mentioned will absorb all of the increased revenue if no more than the amount of this estimate is realized. In addition to that, prudent management requires that there should be set apart from the revenues derived a larger sum above what has been set aside by the company in the past to provide for depreciation and renewal of the property in use.

The company is also called upon to make in the next year very considerable expenditures in the improvement of its track and equipment, including the rebuilding of portions of the track and a considerable amount of paving on account of public work now under construction along its lines, and it has already been permitted by an order of the Commission to issue capital securities for the purpose of realizing funds to perform this work. These capital issues already authorized by the Commission will increase the fixed charges of the company about the sum of \$5,500. It is therefore apparent that even if the maximum return indicated by the 1917 traffic should be realized from the increased fares provided for in the proposed schedule of rates, the whole amount would be required for increased operating expenses, increased

fixed charges, and a proper reserve for depreciation and renewal; and that there can be no promise or hope even that there will be available therefrom any amount which could be used as dividends to stockholders.

Under present conditions it does not appear to the Commission that it will be feasible to put into effect a tariff which even theoretically would give an adequate return on capital actually used in the service, and during the continuance of the war the company should be satisfied if it is in receipt of sufficient funds to enable it to meet operating expenses and fixed charges.

This situation makes it hardly necessary that a valuation of the property used in the service should be made, and the effort of the Commission has been directed only to ascertaining whether that valuation at least equals the amount of the interest-bearing indebtedness. As no adequate valuation has been made or attempted, the figures used for the purpose of determining this proceeding will not be considered as binding in any future rate case prosecuted in normal times and under normal conditions.

Evidence has been given of an appraisal of the property of the company used by it in rendering the service amounting to \$1,134,272.62. Included in this is an inventory of tangible property amounting, at unit figures based upon prices prior to 1914 when the present abnormal rise in values began, to \$714,952.82. We do not desire to approve the basis adopted in this appraisal for the additions to inventory figures to take care of contingencies and omissions, taxes, insurance and interest during construction, and other intangible items. This is especially true in regard to the item of bond discount, which clearly can not be allowed, as that item under accepted accounting practice should be amortized out of return on capital. But some allowance should be made for these items, and without going particularly into the matter, it may fairly be said that for rate purposes a valuation of \$900,000 would be justified. The amount of the funded debt permitted to be issued under the recent order of the Commission is \$775,000, which includes \$50,000 for new improvements and \$20,000 for working capital. It then appears that the amount of the interest-

bearing securities outstanding does not equal the valuation of the tangible physical property used in the service plus the working capital.

The most troublesome question in this case arises by reason of section 181 of the Railroad Law, which prescribes a maximum fare of five cents within the limits of an incorporated city or village. It is now well settled by the judicial construction of this section and of the Public Service Commissions Law that this law does not limit the power of this Commission to fix the rates of fare that may lawfully be charged by a railroad although the railroad can not fix a higher rate than that contained in the statute without an order of the Commission. While the power exists in the Commission, it ought not to be exercised unless it appears that tested by the rules ordinarily employed in rate cases the statutory rate is unjust and unreasonable. In determining that question the statute rather makes the municipality the unit, and in the ordinary case where the operation is wholly within the municipality or the operation out of it is only incidental, this method can be followed. The difficulty in this case arises from the fact that almost the whole operation of this road is suburban and the municipal operation is only incidental. While about two miles of the road is within the city of Syracuse, there is but little local travel on account of the competition of other lines offering greater facilities. The length of the lines in the villages of Fayetteville and Manlius is so short that there is scarcely any travel between any two points in the respective villages. But owing to the fact that the basis of the cash fare in the proposed schedule is three cents per mile, with a minimum of six cents, there is a possible violation of the section in the case of all through passengers carried in Syracuse and any local passengers that may be carried in Syracuse, Fayetteville, or Manlius, unless the Commission so orders.

It is practically impossible to segregate the account of revenues and operating expenses, or even the fixed investment used for the local business from that applicable to the suburban business, as the same equipment is used for all, the local and suburban passengers being carried on the same cars, and there is no distinctly

local operation. The investment in tangible physical property within the city of Syracuse, consisting of pavements, rails, ties, poles, wires, etc., amounts to \$118,817.82. In these figures nothing is included for intangibles, nor does this amount include anything for cars or other equipment, nor any portion of the cost of the power plant. The evidence is that the revenue from the strictly city business, that is from passengers carried from one point to another in the city, is approximately \$7,000 per year, a very small proportion of the total passenger revenue. As it must be evident that the city operation is more expensive than the suburban when consideration is had of the more costly construction of the plant used, the slow speed, and the more frequent stops, it may be fairly said that any conclusions reached as to the rate of return for the system as a whole would apply at least in the same proportion to the city operation were it possible to get at the exact figures. As already demonstrated, the present fares for the whole system do not provide a fair return, neither is it probable that the revenue to be anticipated from the proposed new tariff will more than meet operating expenses and fixed charges; and a finding of the same facts with regard to the city operation is warranted.

All concur.

EDUCATION DEPARTMENT

In the Matter of the **APPEAL FROM THE ACTION OF THE SCHOOL MEETING** Held in District No. 22, Town of Colonie, Albany County, June 4, 1918

Case No. 433

(Decided August 9, 1918)

A meeting held in a school district prior to the time stated in the notice has no authority.

On June 4, 1918, two distinct meetings were held in school district No. 22, town of Colonie, Albany county, each claiming to be in response to a notice issued by the district superintendent under the provisions of section 4, chapter 199 of the Laws of 1918. The notice as issued fixed the meeting time at 7:30 P. M., but prior to that time certain electors of the district met, held a meeting and went through the form of electing officers. At the prescribed hour, however, the regular called meeting was held and organized by electing a chairman and clerk of the meeting and elected three trustees for one, two and three years respectively, a collector and clerk for the ensuing school year, and in all other respects complied with the requirements of the law. *Held*, that the meeting held prior to the hour stated in the notice can have no validity and is without force or effect. Appeal sustained.

FINEGAN, Deputy Commissioner.—It appears from papers on file in this appeal that two district meetings were held in district No. 22, town of Colonie, Albany county, on June 4, 1918, in response to a notice issued by the district superintendent, under the provisions of section 4, chapter 199 of the Laws of 1918.

The notice fixed the hour of meeting at 7:30 o'clock P. M. It is alleged by the appellants that certain electors of the district assembled sometime prior to the hour mentioned, held a meeting, and attempted to elect district officers. The appellants insist that this meeting was illegal for the reason that it was held before the arrival of many of the district electors who assembled at the school-house at 7:30 P. M., prepared to proceed with the business of the meeting. Those who assembled at the hour mentioned,

including the appellants in this proceeding, organized by electing a chairman and clerk of the meeting and then proceeded to elect three trustees for terms of one, two and three years, respectively, and also a collector and clerk for the ensuing school year. A poll list appears to have been kept, twenty-one votes being cast, all in favor of the election of the persons who were nominated for office, as follows: trustee for three years, Paul Rentz; trustee for two years, Allin Depew; trustee for one year, Otto Schultz; collector, George Marsolais; clerk, William Glynn. It is insisted that these persons are the duly elected officers of the district, under the provisions of section 227 of the Education Law, and are entitled to hold office as such.

It is apparent that ill feeling exists in the district and that there are two factions among the electors. The appellants have set forth in the papers filed facts sufficient to show that the officers above named were regularly elected at a meeting which was held in accordance with the notice posted by or under the direction of the district superintendent, as required by the statute which repealed the Township School Law. A meeting held prior to the hour stated in the notice can have no validity and is without force or effect.

It appears that a copy of the appeal papers was served upon the respondents on or about July fifteenth. No answer has been interposed. The facts stated by the appellants, therefore, stand uncontroverted.

The appeal is sustained.

It is ordered that Paul Rentz, Allin Depew and Otto Schultz be and they are hereby recognized and declared to be the duly elected trustees of district No. 22, town of Colonie, Albany county, and that George Marolais and William Glynn be and they are hereby recognized and declared to be the duly elected collector and clerk of said district, respectively, each of said officers having been regularly elected to office at a meeting duly called and held in said district on June 4, 1918, at 7:30 o'clock P. M., and that any and all other meetings of the electors of said district held on the said 4th day of June, 1918, are hereby declared void and of no effect.

In the Matter of the Appeal of A. A. Low, as Agent of the A. A. Low Estate, Relative to the Alteration of the Boundaries of School District No. 3, Town of Piercefield, St. Lawrence County

Case No. 435

(Decided August 13, 1918)

A presumption exists in favor of retaining a district as originally established and now constituted.

Prior to January 27, 1915, school district No. 9, town of Colton, St. Lawrence county, was a large territory, mostly wild and forest lands, having an assessed valuation of about \$486,000, maintaining a main school with two branches and employing three teachers. The adjoining district No. 2, town of Piercefield, in the same county, was smaller and assessed at \$176,000. This district, however, had more children to educate than said district No. 9, and was required to support a main school with two teachers and a branch school at a village called Conifer. About sixty-five pupils lived at or near that place and the branch school was entirely inadequate for their school use. As said district No. 9 was mostly wild and forest lands, and a large lumber enterprise had been established at Conifer and additional school facilities for the children of those employed in that enterprise were required, the district superintendent of the supervisory districts Nos. 6 and 8, St. Lawrence county, determined that a new district should be formed out of districts Nos. 9 and 2, and on January 27, 1915, therefore, they executed an order creating school district No. 3, towns of Colton and Piercefield, for the purpose of maintaining a school at Conifer.

The appellant herein is the agent for the estate of A. A. Low, deceased, which estate owns two tracts of wild or forest lands in the town of Colton, St. Lawrence county, together containing over 18,000 acres, of the assessed valuation of \$91,200. The appellant seeks to have the boundaries of the new district altered by transferring the two tracts owned by the Low estate to district No. 9, town of Colton, in which they were located prior to the creation of such new district. His request having been refused, this appeal is brought from such refusal. *Held*, that the question involved is not the school facilities of children residing in the territory affected, but whether it is unfair that the property formerly located in district No. 9, Colton, should be burdened with the support of a school at Conifer, which is part of a local enterprise in which the owners of the transferred property are not concerned. It appears, however, that the new district has erected a school building and incurred a considerable indebtedness therefor, relying upon the taxable property of

the district as originally established. To grant the relief sought would necessitate taking from the present district nearly two-thirds of its taxable property, leaving about \$100,000 to be taxed for the payment of the principal of outstanding bonds and the maintenance of the district school. *Held*, also, that there is a strong presumption in favor of the retention of the district as it was originally established, and that this presumption has not been overcome. Appeal dismissed.

Ralph Hastings, attorney for appellant.

George H. Bowers, attorney for the respondent A. J. Fields.

FINEGAN, Deputy Commissioner.—The appellant, A. A. Low, is the agent for the estate of A. A. Low, deceased. The said estate is the owner of two tracts of wild or forest lands in the town of Colton, St. Lawrence county, one containing about 17,139 acres and the other 1,043 acres. The total assessed valuation of such lands is \$91,200. Both tracts are located in school district No. 3, towns of Piercefield and Colton. The district is a joint district, lying in supervisory districts Nos. 6 and 8 of St. Lawrence county.

It appears that in January, 1915, the lands referred to were a part of school district No. 9, town of Colton. Such district was a large district, mostly wild and forest lands, having an assessed valuation of approximately \$486,000, maintaining a main school and two branch schools, and employing three teachers. The adjoining district, No. 2, town of Piercefield, was smaller in extent and valuation, having an assessed valuation of about \$176,000. This district had at that time many more children to educate, and was required to maintain a main school with two teachers and a branch school at a hamlet or village called Conifer. The branch school at this place was entirely inadequate to provide for the instruction of the children, about sixty-five in number, living at or near such place. A large lumber enterprise had been established there and it had become necessary to provide additional school facilities for the children of those employed by, and interested in, such enterprise.

The district superintendents of supervisory districts Nos. 6

and 8, St. Lawrence county, after careful consideration of the nature of the territory of the surrounding districts and of their school requirements, determined that the educational interests of the community would be best subserved by the formation of a new district out of the territory of school districts No. 9, Colton, and No. 2, Piercefield. An order was, therefore, executed by the two district superintendents, on January 27, 1915, creating school district No. 3, towns of Colton and Piercefield, obviously for the purpose of maintaining the school at Conifer. The new district had an assessed valuation of about \$275,000 and was formed by taking property valued at \$172,910 from district No. 9, Colton, including the property of the appellant, and property valued at \$101,925 from district No. 2, Piercefield. There was left in district No. 9, Colton, an assessed valuation of about \$313,000, to maintain two schools with only two teachers, while district No. 2, Piercefield, only had \$75,000 of assessed valuation for the maintenance of a department school with two teachers.

After the establishment of district No. 3, Piercefield, a new school building was erected at Conifer, costing about \$12,000, for which bonds were issued and sold, about \$10,000 of which are now outstanding.

The appellant has requested the district superintendents having jurisdiction to alter the boundaries of district No. 3, Piercefield and Colton, by transferring the two tracts owned by the Low estate to district No. 9, town of Colton, in which they were located prior to the creation of the new district. The respondent A. J. Fields, district superintendent of the eighth supervisory district of St. Lawrence county, has refused to join in the execution of an order for such purpose, and this appeal is brought from such refusal. While the appellant is only concerned in the disposition of two tracts owned by the estate which he represents, it will be necessary, if the relief which he seeks is granted, to include also other territory similarly situated which was also taken from school district No. 9, Colton. The appeal is, therefore, to be considered as one seeking to retransfer to such

district the territory taken at the time district No. 3, Piercefield, was created.

The territory affected is for the most part uninhabited. The question does not, therefore, involve the school facilities of children residing in such territory. The main contention of the appellant is that it is unfair to burden the property formerly located in district No. 9, Colton, with the support of a school at Conifer, which is a part of a local enterprise, in which the owners of the transferred property are not concerned. The objection now raised by the appellant is one which might have been raised at the time that district No. 3, Piercefield, was created. There does not appear to be any sufficient reason for the delay in bringing to the attention of the Department the alleged injustice in creating a district for the maintenance of a school at Conifer by taking the territory in question from district No. 9, Colton. The new district has erected a new building and incurred a considerable indebtedness therefor, relying upon the taxable property in the district as originally established. The statute authorizes the alteration of the boundaries of district No. 3, Piercefield, by retransferring the territory formerly taken from district No. 9, Colton. Upon such retransfer the territory would be relieved from taxation on account of the bonded indebtedness incurred for the erection of a new school building, and the entire indebtedness would have to be borne by the remaining taxable property in the district. To afford the relief sought by the appellant it would be necessary to take from the present district nearly two-thirds of its taxable property, leaving about \$100,000 to be taxed for the payment of the principal and interest of the outstanding bonds and for the maintenance of the school in the district. The existence of the bonded indebtedness is of itself sufficient reason for sustaining the act of the district superintendent in refusing to dismember the district.

There is a strong presumption in favor of the retention of the district as it was originally established. The district superintendents in creating the new district had in mind a fair and equitable distribution of the burden of providing suitable school accommodations to the children of the community upon the

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property fairly taxable therefor. It seems quite clear that in coming to a conclusion as to the property which should be so taxable, they made no serious error. It may be that the property in question would be taxable at a less rate if it had been left in the district in which it was originally located, but the tax to be imposed upon this property on account of the school maintained in the new district is not excessive. The appellant has failed to overcome the natural presumption which exists in favor of the retention of the district as now constituted, and has not presented a convincing reason for setting aside the act of the district superintendents in establishing this district in 1915.

The appeal is dismissed.

In the Matter of the Appeal of ROSE DAVIDSON, BRIDGET C. PEIXOTTO, ANNA C. JOHNSTON, CATHERINE I. TILLMAN, CLARE KLEISER, ERNA L. BEHNKEN, JENNIE G. BOWTELLE, CATHARINE D. FREY, HELEN M. HYNES, and EVA C. WOOD, Relative to Appointments of Principals from Eligible Lists

Case No. 434

(Decided August 15, 1918)

Legality of separate lists for men and women candidates for the position of principal of elementary schools.

The contention of the appellants herein, all of whom are licensed teachers in the public schools of New York city and the holders of principal's licenses authorized to hold the position of principal of an elementary school in that city, is that the practice of having separate lists for men and for women teachers eligible to hold the position of principal is illegal under the statute as it now stands.

The practice of placing the names of men and women candidates for the position of principal of elementary schools on separate lists existed as early as 1898, and has been continued to the present time. The legality of the practice has been sustained by the courts in several cases. A determination of the question at issue involves the construction of sections 871 and 872 of the Education Law, as inserted by the Laws of 1917, chapter 786, and of section 1089 of the Greater New York Charter, as amended by chapter 456 of the Laws of 1912. The latter section was

repealed by chapter 786 of the Laws of 1917 and so much of it as pertains to the present controversy was re-enacted in the sections above cited of the Education Law. The practice of separate lists for men and women has been recognized as essentially beneficial to the administration of the school system of the city. The Commissioner of Education would not be justified in nullifying this long continued practice, supported as it is in its legality by well considered decisions of the court, without it being made to appear beyond serious controversy that the practice was erroneous or that it had been rendered unlawful by subsequent statutory enactment. Appeal dismissed.

Charles T. Kingsley, attorney for appellants.

William P. Burr, corporation counsel of the city of New York
(Charles McIntyre, of counsel), attorney for respondent.

FINEGAN, Deputy Commissioner.—The appellants herein are licensed teachers in the public schools of the city of New York. Each of them is the holder of a principal's license and is authorized to hold the position of principal of an elementary school in such city. Their names appear upon the eligible list of women teachers holding principals' licenses, prepared in December, 1910, by the board of examiners of the city in conformity with the provisions of section 1089 of the Greater New York Charter. It appears from the answer of the respondent, and it has not been denied by the appellants, that the eligible list of 1910 was prepared after an examination open only to women teachers, and that prior thereto in 1906 an examination was held open only to men teachers and based thereon an eligible list was prepared, containing the names of men candidates for the position of principal in elementary schools. The list of men candidates having been exhausted, an examination of men teachers was held and a new eligible list prepared in the year 1913, from which appointments of men principals have been made. It follows that there are two lists of candidates for principal of elementary schools now in existence, one of women and one of men, and from these respective lists women and men principals are appointed.

It is contended by the appellants that under the present law there should be only one eligible list of candidates for the position

of principal of elementary schools, and that there was no legal authority for the preparation of a separate eligible list of male candidates, but that under the statute the eligible list of women candidates prepared in 1910, upon which the appellants' names appear, should have been exhausted, before access could be had to any subsequent list. If this contention is tenable the appellants are entitled to appointment to positions of principals of elementary schools, in preference of those names which appear upon the men's eligible list of 1910, and the practice, which has been followed for many years, of appointing men principals from one eligible list and women principals from another is erroneous.

A determination of the question involves the construction of sections 871 and 872 of the Education Law, as inserted by Laws of 1917, chapter 786, and of section 1089 of the Greater New York Charter, as amended by chapter 456 of the Laws of 1912. The latter section was repealed by Laws of 1917, chapter 786, and so much of it as pertains to the present controversy was re-enacted in sections 871 and 872 of the Education Law above referred to. Such section 1089 of the Greater New York Charter, as it existed prior to the amendment of 1912, created a board of examiners whose duty it was to examine all applicants for positions as teachers and "to issue to those who pass the required tests of character, scholarship and general fitness such licenses as they are found entitled to receive." The section further provided that "The board of education on the recommendation of the board of superintendents shall designate, subject to the requirements of the state school laws in force when this act takes effect or that may thereafter be enacted, the kinds or grades of licenses to teach which may or shall be used in the City of New York, together with the academic and professional qualifications required for each kind or grade of license. * * *

The board of examiners shall hold such examinations as the city superintendent may prescribe and shall prepare all necessary eligible lists which shall be kept in the office of the city superintendent of schools. * * *

The names of those to whom licenses have been granted * * * shall be entered by the city

superintendent upon lists to be filed in his office, a separate list being made for each grade or kind of license for which the board of education shall by its by-laws make provision. Except as city superintendent or associate city superintendent or district superintendent, as director of a special branch, as principal of or teacher in a training school or as principal of a high school, no person shall be appointed to any educational position whose name does not appear upon the proper eligible list."

The part of the section above quoted was contained in substantially the same form in section 1081 of the original charter of 1897. The practice of placing the names of men and women candidates for the position of principal of elementary schools on separate lists existed as early as 1898, and has been continued to the present time. The legality of this practice has been sustained by the courts. See *Matter of Schlivinski*, 80 App. Div. 313. The reason for it from an educational standpoint is sound. It is obvious that if it was not permissible under the statute, the board of education of the city would be prevented from exercising the discretion of assigning men principals to schools requiring the services of men and women principals to schools where women are better adapted to the conditions to be met.

The amendment to section 1089 of the charter by chapter 455 of the Laws of 1912 provides that "Such eligible lists shall not be merged and one eligible list shall be exhausted before nominations are made from a list of subsequent date. Provided, however, no eligible list shall remain in force for a period longer than three years, excepting the principals' eligible list, which shall remain in full force and effect until exhausted." This provision was continued in section 871 of the Education Law, as inserted by Laws of 1917, chapter 786, and is now the law. The original amendment applied to lists then in existence. The effect of it, as applied to the existing separate lists of men and women candidates for principal of elementary schools, was to prevent the adding of names of applicants to either of such lists until it was exhausted. Assuming that the separate lists had been prepared legally there was no merger or other violation of the amendment if appointments continued to be made from each of such lists until exhausted.

If it had been the intention of the Legislature in the enactment of the amendment to prohibit the continuance of the practice of preparing separate lists for men and women candidates for the position of principal of elementary schools appropriate language could have easily been used for such purpose. The amendment must be construed and applied with relation to the conditions existing at the time of its enactment. Separate lists for men and women candidates having been in existence at the date of the amendment, the amendment did not operate as a prohibition of the continuance of such separate lists.

The argument presented in behalf of the appellants does not indicate that it is contended that the practice of maintaining separate lists for men and women principals prior to the amendment of 1912 was illegal. The practice of maintaining such separate lists had continued for many years prior to that time. It was recognized as essentially beneficial to the administration of the school system of the city. The validity of the practice had been attacked in the Supreme Court in at least two cases and it was decided in each of them that the board of education, in the exercise of the discretion conferred upon it, was authorized to prepare separate lists of men and women applicants for teachers' positions. The case of *Matter of Schlivinski*, 80 App. Div. 313, clearly declares that the statute did not prevent the preparation of separate lists for men and women candidates. The case of *Fitzpatrick v. Board of Education*, 69 Misc. Rep. 78, recognized the discretion vested in the board of education to determine whether a given position shall be filled by a man or a woman, and sustains the practice of the board in making separate eligible lists for male and female teachers.

The Commissioner of Education would not be justified in nullifying this long continued practice, supported as it is in its legality by well considered decisions of the court, without it being made to appear beyond serious controversy that the practice was erroneous or that it had been rendered unlawful by a subsequent statutory enactment. It frequently happens that the position of principal of an elementary school may best be filled

by a woman and there are many other similar positions which should be filled by men. To deprive the board of education of the discretion to determine that a certain principal's position should be filled by a man, as might be the case if all such positions were to be filled from a list containing the names of both men and women, would seriously interfere with the proper administration of the school system. The statute could not be construed to prevent the exercise of such discretion unless the language used clearly shows that such was the legislative intent. Section 1089 of the Greater New York Charter, as amended by chapter 455 of the Laws of 1912, and the subsequent reenactment of the provisions of such section as amended, relative to the merger of eligible lists, do not prohibit the making of two separate lists of men and women applicants for the position of principal and, therefore, the appellants' petition praying that the list of 1910, containing the names of women candidates for the position of principal in elementary schools be exhausted before appointment be made from any other list, must be denied.

The appeal is dismissed.

In the Matter of the Application of the BOARD OF EDUCATION OF
UNION FREE SCHOOL DISTRICT NO. 7, TOWN OF HEMPSTEAD,
COUNTY OF NASSAU, for Ratification and Confirmation of the
Proceedings of the District Meeting Authorizing the Issuance
of School District Bonds

Case No. 436

(Decided September 9, 1918)

Construing section 467, subdivision 3, of the Education Law in reference to the notice of a meeting of a union free school district for issuing certain bonds.

The board of education of union free school district No. 7, town of Hempstead, county of Nassau, has petitioned the Commissioner of Education for the ratification and confirmation of the proceedings of a district meeting held June 4, 1918, for the purpose of voting upon a

resolution for the issuing of bonds to an amount not to exceed \$9,000, for the erection of an addition to the existing school building. The various steps taken to comply with the law as related to such meeting are set forth in the opinion.

Section 467, subdivision 3, of the Education Law does not require that the notice of a meeting of a union free school district for the issuing of bonds to cover the cost of an addition to an existing school building shall state that the levy and collection of a tax for the payment of such bonds shall be in installments.

Application granted, and proceedings of the meeting in question ratified and confirmed.

FINEGAN, Acting Commissioner.—The board of education of union free school district No. 7, town of Hempstead, county of Nassau, has filed a petition with the Commissioner of Education for the ratification and confirmation of the proceedings of a district meeting held on Tuesday, June 4, 1918, called for the purpose of voting upon a resolution authorizing the board of education to issue bonds to an amount not to exceed \$9,000 to cover the cost of the erection of an addition to the present school building.

It is provided in subdivision 7 of section 480 of the Education Law, as added by chapter 413 of the Laws of 1917, that the Commissioner of Education may legalize and validate the bonds or other evidences of indebtedness issued by a board of education as provided in such section. He may also, upon application being made by a board of education, ratify and confirm the acts and proceedings of a district meeting and of the board of education of the district relative to the issue and sale of bonds, upon it appearing to his satisfaction that there has been a substantial compliance with the provisions of the Education Law pertaining to the issue and sale of school district bonds. It is further provided that if there has been a fair expression of the will of the qualified electors of the district and it appears that the action taken by the district meeting was not "affected or prejudiced by defects in or the failure to give the notice required by statute, or if it appears that the failure to take or defect in any step in the acts or proceedings of district officers or meetings did not influence materially the result of such meeting," he may disregard

such defects and failure and determine that there has been a substantial compliance with the statute.

The notice of the meeting was posted as provided by law, and in addition thereto a personal notice was given to the qualified electors of the district. The notice stated that the meeting was called for the purpose of voting upon a resolution authorizing the board of education "to issue bonds to an amount not to exceed nine thousand dollars (\$9,000) to cover the cost of the erection of an addition to the present school building." The notice did not state that it was proposed to authorize the levy and collection of a tax in installments.

It is provided in section 467, subdivision 3, of the Education Law, that the notice of a meeting to vote a tax for the erection of an addition to a schoolhouse in a union free school district shall state the amount of the tax proposed and shall specify the object thereof and the amount to be expended for the addition. The statute does not require that the notice state that the tax is to be levied in installments. It must therefore be held that the notice of the meeting was in substantial compliance with the provisions of the statute.

The resolution adopted by the meeting was in the following form:

"Resolved, That the Board of Education of Union Free School District No. 7, Town of Hempstead, Nassau County, N. Y., be and is hereby authorized and directed to issue bonds to an amount not to exceed Nine Thousand (\$9,000) Dollars to cover the cost of the erection of an addition to the present school building."

This resolution does not upon its face direct the board of education to raise the sum specified in annual installments. It appears, however, that the meeting was informed by the board of education that it was proposed to raise the tax in nine annual installments and that the bonds to be issued were to be nine bonds of \$1,000 each, the first of which was to mature on July 1, 1919, and one of the remainder of the bonds each year thereafter. Under these circumstances the resolution may properly be construed as a direction to the board to levy and collect a tax of \$9,000 in nine equal

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annual installments of \$1,000 each. The resolution was defective in that it failed to direct the levy of a tax in equal annual installments. This defect is one, however, that under the statute may be disregarded in a proceeding brought for a ratification and confirmation of the acts and proceedings of the meeting. The evidence adduced justifies a decision to the effect that there has been a substantial compliance with the requirements of the statute and that the acts and proceedings of the meeting in voting for the issuance of the bonds should be ratified and confirmed.

It is hereby ordered that the acts and proceedings of the special school meeting held in union free school district No. 7, town of Hempstead, Nassau county, N. Y., on Tuesday, June 4, 1918, in adopting a resolution that the board of education of such district be authorized and directed to issue bonds to an amount not to exceed \$9,000 to cover the cost of the erection of an addition to the present school building, be and the same hereby are ratified and confirmed; and

It is hereby further ordered that the acts and proceedings of the board of education of said union free school district No. 7 of the town of Hempstead, Nassau county, N. Y., in the sale of bonds of such district in the sum of \$9,000 to H. A. Kahler & Co. be and the same hereby are legalized, ratified and confirmed; and the said board of education be and the same hereby is directed, upon receiving the purchase price of such bonds, to issue to the said H. A. Kahler & Co. nine \$1,000 bonds, bearing interest at the rate of 5 per centum, the first of which bonds shall mature on July 1, 1919, and one of such \$1,000 bonds annually thereafter; and the said board of education be and it hereby is authorized and directed to levy a tax in nine equal installments sufficient to pay the principal and interest of such bonds as they fall due.

In the Matter of the Appeal of MYRTLE CORBETT HEYWOOD from
Certain Acts of the Board of Examiners of the City of New
York, Relative to the Issuance of Teachers' Licenses

Case No. 437

(Decided September 13, 1918)

The Commissioner of Education cannot, in an appeal brought from the official acts of the board of examiners in the city of New York, direct as to what shall be done by the city superintendent of schools in respect to the issuance of a permanent license to an applicant therefor.

The appellant entered an examination by the board of examiners for a license as assistant teacher of accounting and business practice in the day high schools. She passed the examination but was refused a license "on account of unsatisfactory record." She appealed to the Commissioner of Education and the action of the board was sustained. This finally disposed of her contention as to her right to be licensed in the above named capacity. In December, 1917, the appellant took an examination for the position of first assistant teacher of accounting and commercial law in the day high schools and the board of examiners denied her application for such license stating that such denial was based upon the appellant's record. The appellant insists that this action was discriminatory and unfair and asks that an order be made directing the board to issue the license to her. The reason, it appears, that the license was refused was that the appellant had made statements imputing to the board of examiners unwillingness to grant licenses without money therefor. No explanation of her statements has been made by her.

Held, that the board of examiners has no power to issue, or refuse to issue, a permanent license. The appellant, if she desires such license, must apply to the superintendent of schools who has the power to issue licenses under the regulations of the board, but the Commissioner of Education cannot in an appeal brought from the official acts of the board of examiners direct as to what shall be done by the superintendent of schools in regard to the issuance of a permanent license to her.

Appeal dismissed.

Charles F. Kingsley, attorney for appellant.

Charles McIntyre, assistant corporation counsel, attorney for respondents.

FINEGAN, Acting Commissioner.— The appellant herein brings two appeals from certain acts of the board of examiners of the city of New York in refusing to issue to her certain licenses, which she claims to have earned, to teach commercial subjects in the day and evening high schools of the city.

It appears that the appellant entered an examination, held by the board of examiners on April 9, 1917, for a license as assistant teacher of accounting and business practice in day high schools. She obtained a passing mark upon such examination but her application for a license was denied on June 21, 1917, "on account of unsatisfactory record." She appealed to the Commissioner of Education from the board's denial of her application and the action of the board was sustained in a decision rendered December 6, 1917. 14 St. Dept. Rep. 455. The determination then made disposes of the appellant's present complaint as to the action of the board in denying her a license as assistant teacher of accounting and business practice in day high schools, based on the examination of April, 1917.

In December, 1917, the appellant entered an examination for the license of a first assistant teacher of accounting and commercial law in the day high schools. This license qualifies the holder to be the head of a department of accounting and commercial branches in high schools. The board of examiners denied her application for such license on April 12, 1918, stating that such denial was based upon the appellant's record. The appellant insists that such denial was discriminatory and unfair, and asks that an order be made directing the board to issue the license to her.

The respondents state as a reason for the denial the inferential charge made by the appellant against the board of examiners that her failure to obtain licenses upon examination was because of her unwillingness to pay money therefor. The circumstances under which such charge was made have been related fully in the decision of the previous appeal brought by the appellant (See Matter of Appeal of Heywood, No. 403, December 6, 1917, 14 State Dept. Rep. 455), and it is unnecessary to repeat them here.

It does not appear that the appellant has at any time or in any way explained what she meant by the imputation that licenses were obtainable upon payment of money. She has not attempted to present definite proof of any fraud or corruption in respect to teachers' examinations or the issuance of licenses; she does not in her papers in the present appeal explain the statements made by her from which inferences of fraud on the part of the board might be drawn, and she has not retracted any of the imputations of fraud or misconduct contained in her petition in the former appeal. Investigations have been made by competent officials in the city of New York and no basis for the appellant's imputations has been found. As indicated in the decision in her former appeal, her conduct in asserting groundless charges reflecting seriously upon the integrity of the board was reprehensible. The record of her acts relative to such charges and to her failure to explain or retract might well be deemed by the board as unsatisfactory. Having reasonably exercised the discretionary power conferred upon them in denying the appellant's application for a license as first assistant teacher of accounting and commercial law in day high schools, the action of the board as to such license is sustained.

The appellant also complains of the refusal of the board of examiners to renew her license as an assistant teacher of bookkeeping in the evening high schools for the year 1917-1918. The application for such renewal was denied by the board because of an unfavorable rating which had been given to her by the principal of the evening high school for her evening school work during the session of 1916-1917 and because of absence during a portion of the session. It appears that the petitioner was granted the license of assistant teacher of bookkeeping in the evening high schools in the year 1912, which license was issued for the session of that year and renewed each year thereafter until the session of 1917-1918. It is contended by the appellant that having taught longer than the probationary period of three years her license as assistant teacher of bookkeeping in the evening high

schools became permanent automatically, and that she could not be deprived of her license by the refusal of the board to renew it.

Under section 1089 of the Greater New York Charter as it existed prior to its repeal in 1917, licenses to teach were issued by the city superintendent of schools for a period of one year, renewable without examination in case the work of the holder was deemed satisfactory to the city superintendent for two successive years; and it was also provided that "at the close of the third year of continuous and successful service the city superintendent may make the license permanent."

The City School Law (Laws of 1917, chap. 786) does not contain this provision, but in section 872, subdivision 1, of such law it is provided that teachers shall be appointed "for a probationary period of not less than one year and not to exceed three years." In subdivision 3 of such section it is provided that all teachers "who have served the full probationary period, or have rendered satisfactorily an equivalent period of service prior to the time this act goes into effect, shall hold their respective positions during good behavior and efficient and competent service and shall not be removable except for cause after a hearing by the affirmative vote of a majority of the board." At the expiration of the probationary term of persons who have been appointed for such term, the board of superintendents is required by this subdivision to make a written report to the board of education recommending for permanent appointment those persons who have been found competent, efficient and satisfactory.

Under the provisions of section 1089 of the New York Charter and the subsequent provisions of the City School Law, it was within the jurisdiction of the city superintendent to issue to the appellant a permanent license upon it appearing to him that she had completed three years of continuous and successful service as a teacher. The provisions of the charter did not entitle the appellant to a permanent license as a matter of right upon the completion of three years' service. The present law leaves with the board of superintendents of the city the power to determine whether the appellant shall be recommended for permanent

appointment. Even a recommendation for a permanent appointment does not in itself legally entitle a teacher to continue in the service. In addition to such recommendation a teacher must meet the requirements of the law and the regulations prescribed thereunder in relation to the certification of teachers. The Commissioner of Education has no power under the statute to direct the action of the city superintendent or the board of superintendents as to making permanent the license as an assistant teacher of bookkeeping in evening high schools which has been granted to the appellant, in the absence of proof that such superintendent or board of superintendents has discriminated unreasonably against the appellant. It does not appear that the appellant has sought to obtain from the proper authorities a permanent license as such teacher.

The board of examiners has no power to issue or refuse to issue a permanent license. If the appellant seeks the issuance of a permanent license application must be made to the city superintendent of schools, who has the power to issue licenses under such regulations as the board of education may have prescribed. The Commissioner of Education cannot, therefore, in an appeal brought from the official acts of the board of examiners direct as to what shall be done by the city superintendent of schools in respect to the issuance of a permanent license to her.

The appellant also seeks relief from the threatened act of the board of examiners in refusing to renew her license as a substitute teacher in the day high schools. Her license as a substitute was originally issued in 1912 and was thereafter renewed by the city superintendent from year to year. Each renewal was for the period of one year. The last renewal was made on November 1, 1917, for a period of one year. Such license does not expire until November 1, 1918. It may be that upon application to the city superintendent of schools a renewal of this license will be granted. This is a matter to be determined by the city superintendent when it comes before him. It is not a proper subject of appeal at the present time.

The appeal is dismissed.

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In the Matter of the Application of JAMES C. BYRNES, WALTER L. HERVEY, JEROME A. O'CONNELL and GEORGE J. SMITH, Board of Examiners of the Department of Education of the City of New York, for the Revocation of the License of MYRTLE CORBETT HEYWOOD as a Substitute Teacher of Commercial Branches in Day High Schools

Case No. 438

(Decided September 13, 1918)

Where the school authorities of the city of New York have full jurisdiction to take action in a given case it is unnecessary for the Commissioner of Education to hear the matter.

The petitioners ask for the revocation of a license issued to Myrtle Corbett Heywood as a substitute teacher in stenography and typewriting in day high schools. As the license sought to be revoked would expire November 1, 1918, and would then terminate unless renewed by the superintendent, the matter was entirely in the hands of that official and it therefore is unnecessary for the Commissioner to entertain the proceeding.

Appeal dismissed.

Charles McIntyre, assistant corporation counsel, attorney for appellants.

Charles F. Kingsley, attorney for respondent.

FINEGAN, Acting Commissioner.—The petitioners, James C. Byrnes, Walter L. Hervey, Jerome A. O'Connell and George J. Smith, are members of the board of examiners of teachers of the department of education of the city of New York. They have instituted this proceeding for the revocation of a license as a substitute teacher in stenography and typewriting in day high schools held by Myrtle Corbett Heywood. Such license was renewed by the acting superintendent of schools for the period of one year from November 1, 1917. They allege as grounds of such revocation that the respondent is guilty of misconduct in falsely charging the petitioners, as members of the board of examiners of the

education department of the city, with fraud in connection with the issuance of licenses to teachers, in that such licenses may be obtained upon the payment of money. Such false statements as to the accepting of money for teachers' licenses were contained in papers upon an appeal before the commissioner of education. No evidence was submitted upon such appeal in support of the charges made against the board, and the Commissioner of Education exonerated the board. In March, 1918, the respondent wrote a letter to the mayor of the city of New York complaining of her failure to obtain a license as teacher of commercial subjects in the high schools of the city, in which she stated that she had passed the required examinations for such license more than once and her license had not been granted, primarily because she had refused to pay a large sum of money for the position.

The nature of the respondent's offense has already been characterized in the decision upon an appeal brought by the respondent from the refusal of the board of examiners to grant certain licenses to her. Her conduct in failing to substantiate the charge of fraud and corruption which she has made against the board, after having been given an opportunity to do so, and her repetition of such charge in a letter to the mayor of the city, is reprehensible.

The license sought to be revoked expires on November 1, 1918. The license was renewed by the acting superintendent of schools and will terminate at the time specified unless again renewed by the city superintendent of schools. It thus appears that the school authorities of the city have within their own control the disciplinary measures to be taken in the case. It will be for the city superintendent to determine whether the respondent shall be permitted to continue to teach under her license as a substitute teacher. It therefore seems unnecessary for us at this time to entertain proceedings for the revocation of the respondent's license.

The petition is dismissed.

In the Matter of the Appeal from the ACTION OF THE SPECIAL DISTRICT MEETING held in District No. 7, Town of Callicoon, Sullivan County, August 5, 1918

Case No. 439

(Decided September 23, 1918)

Objections to a proposed new school site in district No. 7, Callicoon.

The district in question is a joint common school district located partly in the town of Callicoon and partly in the town of Fremont, Sullivan county. At a special district meeting duly called and conducted, a resolution was adopted for the erection of a new school-house, the old building being some sixty-five years old, on a site about three-eighths of a mile from the present school building. This appeal is brought against the change on the ground of inadequate reasons for leaving the present site. *Held*, that the appellants have failed to establish that the site selected is not suitable; that the proposed site is not sufficiently large for the use of the school, and that the offer of the owner to deed to the district an additional one-half acre of ground adjoining the new site should be accepted. On account of the war conditions, however, it is declared desirable that the building of the proposed new structure be postponed. Appeal dismissed.

Robert B. McGinn, attorney for appellants.

Guernsey T. Cross, attorney for respondent.

FINEGAN, Deputy Commissioner.—District No. 7, Callicoon, is a joint common-school district located partly in the town of Callicoon and partly in the town of Fremont, Sullivan county. The school building in said district was erected about sixty-five years ago near the boundary line between the two towns but within the town of Callicoon.

On the 5th day of August, 1917, a special district meeting was held to act upon the designation of a new site and the erection of a new school building in said district. A new site

was designated at the meeting consisting of one-half acre of land located in the town of Fremont and about three-eighths of a mile from the present school building and an appropriation of \$1,000 was voted for the erection of such building. The meeting was attended by practically every qualified voter in the district and it appears from the minutes that the propositions were carried by a vote of nineteen to twelve and eighteen to twelve, respectively. The appellants do not challenge the regularity of the meeting or of its proceedings. They contend that there was no adequate reason for the change of site and that the real motive which actuated the voters who favored the proposition of changing the site was their desire to secure the location of the new school building in the town of Fremont. The appellants also contend that the site selected was not sufficiently large for the school purposes, is not as accessible to certain pupils of the district as is the present site, and that it is located near a building formerly used as a slaughterhouse.

The appellants have failed to establish to my satisfaction that the site selected is not suitable. It is located very nearly in the center of the district and while a few pupils may be required to travel a slightly greater distance to and from school than is the case at the present time an equal or a greater number of pupils will be correspondingly accommodated. The lot is not sufficiently near any building to render the site undesirable for school purposes. It is not the policy of the Education Department to interfere with the action of a district meeting in changing its school site in the absence of evidence of inaccessibility to the pupils of the district or of unsanitary conditions or surroundings which might jeopardize the health of the pupils.

I find, however, that the lot is not as large as should be acquired for the use of the school. It developed upon the hearing on this appeal that the owner of the property, from whom the new site was purchased, is willing to grant to the district, without extra compensation, an additional one-half acre of ground adjoining that already deeded to the district and in connection therewith a right of way to a spring from which water can be conveniently

obtained for the use of the school. It is suggested that the district immediately proceed to acquire the title to such additional one-half acre, together with such right of way, including the right to use the waters of the spring. The deed of the school site should be unconditional and the title free from encumbrances.

With respect to the erection of the proposed building, it seems desirable on account of the war conditions that proceedings be suspended for the present.

The appeal is dismissed.

In the Matter of the Appeal from the ELECTION OF TRUSTEE
IN SCHOOL DISTRICT No. 7, TOWN OF GATES, MONROE COUNTY,
at the District Meeting held June 4, 1918

Case No. 440

(Decided September 27, 1918)

A school election will not be set aside where there is failure to show that a sufficient number of illegal votes were cast to change the result.

In common school district No. 7, town of Gates, Monroe county, on June 4, 1918, a meeting was had at which forty-three votes were cast for Harry Henry for trustee and thirty-four votes were cast for George Neracker. Henry was duly declared elected. The appeal herein is based upon the allegation that eleven of the votes cast for Henry were illegal. *Held*, that such allegation has not been sustained and that even were it true it had not been shown for whom the alleged illegal votes were cast, and, therefore, there was no proof that they changed the result of the election. It having been alleged that the trustee elected is not a citizen of the United States, on the proof adduced, *held*, also, that such fact has not been definitely established. Election sustained. Appeal dismissed.

George Y. Webster, attorney for respondent.

FINEGAN, Acting Commissioner.—A district meeting was held in common school district No. 7, town of Gates, Monroe county, June 4, 1918, upon call of the district superintendent, issued pursuant to the provisions of chapter 100 of the Laws of 1918, commonly known as the Township Repeal Law. The meeting

was well attended by the electors of the district and it appears that of the seventy-seven ballots cast for trustee Harry Henry received forty-three votes and George Neracker received thirty-four votes. Harry Henry was thereupon declared elected trustee for the ensuing school year.

The appellants allege upon information and belief that eleven of the voters who participated in the meeting were not qualified to vote. There is nothing more than the mere allegation on information and belief that the persons named were not taxpayers, parents of children of school age or having children of school age residing with them and that such persons were not qualified electors. Each of such persons may have owned or hired taxable real property, although not a taxpayer, and be, therefore, a qualified elector. Unless there is specific proof showing a definite disqualification as to each alleged disqualified voter, it will be presumed that a person voting for a school officer had a legal right to vote. The votes of the alleged disqualified voters may not be thrown out upon the proof here presented.

Even if it were held that the persons named had no legal right to vote the election may not be set aside for the appellants have failed to allege or show for whom the alleged illegal votes were cast and it, therefore, does not appear that such votes, even if illegal, changed the result of the election. It has been frequently held that an election will not be set aside where the appellants fail to show that illegal votes were cast for the successful party in sufficient numbers to change the result.

The appellants further allege upon information and belief that the said Harry Henry is an alien, having been born in Canada and never having been naturalized pursuant to the laws of the United States. This allegation is denied by the respondent, who states that he was born in the State of New York and is duly qualified to hold the office to which he was elected. In the absence of definite proof that the trustee-elect is not a citizen of the United States he can not be declared disqualified and his election must be sustained.

The appeal is dismissed.

In the Matter of the Appeal of WILLIAM F. MARSH from the Refusal of the Board of Education of the Town of Huntington, Suffolk County, N. Y., to Pay Compensation under a Contract to Teach

Case No. 441

(Decided October 10, 1918)

Claim by a teacher for compensation during two weeks vacation time.

The appellant entered into a teacher's contract with the trustees of school district No. 12, town of Huntington, Suffolk county. The contract failed to make any provision for a vacation period. Appellant claims compensation for the two weeks that the school was closed for vacation. As he did not protest against the closing, *held*, that he must be deemed to have acquiesced in such course and that he is not entitled to compensation for such additional time. Appeal dismissed.

FINEGAN, Acting Commissioner.—The appellant, William F. Marsh, was employed by the trustees of school district No. 12, town of Huntington, Suffolk county, to teach the school in such district for a term of forty weeks beginning on the first Tuesday in September, 1917. The contract was in the usual printed form, with a blank space provided for a statement as to the vacation period. No special provision was made for a vacation. The school closed on the twenty-first of June, forty-two weeks after the date of the beginning of the term. The appellant was paid compensation at the rate of sixteen dollars a week, as specified in the contract, for a period of forty weeks, being the time actually taught by him under his contract. He claims that under his contract he is entitled to compensation for the two weeks that the school was closed for vacation.

It does not appear that the appellant made any protest against the closing of the school for a vacation. In the absence of such protest it must be presumed that he acquiesced in the closing of the school for the usual vacation period. He admits that he has been paid for the number of weeks taught under his contract.

It would seem, therefore, that the appellant has been fully compensated for his services rendered under his contract, and that since no special provision was made for compensation for services beyond the period of forty weeks he is not entitled to compensation for such additional time. His appeal must therefore be dismissed.

The appeal is dismissed.

In the Matter of the Appeal from the DECISION OF THE DISTRICT SUPERINTENDENT OF SCHOOLS of the Third Supervisory District of the County of Chautauqua, Refusing to Dissolve School District No. 15, Town of Harmony, and Annex the Territory Thereof to Union Free School District No. 3, Town of Chautauqua

Case No. 442

(Decided October 25, 1918)

Investigation as to the merits of a proposed consolidation of two adjacent school districts.

At the annual meeting of school district No. 15, town of Harmony, Chautauqua county, held June 4, 1918, a resolution was adopted directing the district superintendent to effect the consolidation of that district with district No. 3, Chautauqua, immediately. A copy of such resolution, with due notice of adoption, was then served upon Dorothy Barnes Connelly, district superintendent of schools of the third supervisory district of Chautauqua county, who refused to consolidate the districts. This appeal is from such refusal. The two districts adjoin and the railroad of the Chautauqua Traction Company runs through both districts and near the school building in district No. 3. Most of the school children live close to the railroad. For many years the Harmony district has had the advantage of the grades of the school at Chautauqua and has paid nothing but the contract price for instruction toward the maintenance of the school, less than the cost *per capita* of such maintenance. *Held*, that the only effective way of equalizing the taxes is to consolidate the two districts so that the taxable property in each district may be taxed equally for the maintenance of the school which serves the inhabitants of both districts. Appeal sustained and the district superintendent of the third supervisory district of Chautauqua county and

the district superintendent of the fourth supervisory district are directed, upon obtaining the written consents of certain school authorities named in the order, to dissolve district No. 15, town of Harmony, and annex the territory thereof to union free school district No. 3, town of Chautauqua.

FINEGAN, Acting Commissioner.—The appellant herein is the sole trustee of school district No. 15, town of Harmony, Chautauqua county. The annual meeting of such district, held June 4, 1918, adopted a resolution in the following form:

“Resolved, that the district superintendent be directed to take necessary steps to effect the consolidation of district No. 15, Harmony, with district No. 3, Chautauqua, immediately.”

This resolution was adopted by a vote of thirteen to seven. A copy of such resolution, with notice of its adoption, was served subsequently upon Dorothy Barnes Connelly, district superintendent of schools of the third supervisory district of Chautauqua county, and she acknowledged receipt of the same. On August first the appellant requested the respondent district superintendent to render her decision on the application and she informed him that she had decided to refuse to consolidate the districts. The appeal is brought from such refusal.

The two districts are adjacent. The railroad of the Chautauqua Traction Company runs through both districts, and only a short distance from the school building in union free school district No. 3. Nearly all of the children of school age in district No. 15, Harmony, live near the railroad and may be carried conveniently to and from the school in the Chautauqua district. The Harmony district has not maintained a home school for many years, having contracted continuously for more than thirteen years for the instruction of its children in the school in the Chautauqua district. During all this period the inhabitants of the Harmony district have had the advantage of the graded school at Chautauqua, and have contributed nothing but the contract price for the instruction toward the maintenance of such school. The amount so paid has been much less than the cost, *per capita*, of such maintenance.

A considerable portion of the inhabitants of the Harmony district have expressed their opposition to the consolidation of the two districts. The sentiment for and against such consolidation is about equally divided. But those opposed to the consolidation are apparently willing that the district should continue contracting with the Chautauqua district.

The fact that the two districts have for so many years been served with the same educational facilities indicates, clearly enough, that the prevailing opinion based upon actual experience is that the educational interests of the children of the Harmony district are best conserved and promoted by giving to them the superior advantages of the Chautauqua school. The school building at Chautauqua is new, with modern equipment and all essential appliances. The district maintains a high school and a school of agriculture and homemaking. No such facilities could be afforded by the Harmony district if it was compelled to provide instruction for its pupils in its own school.

If the Harmony district desires to continue permanently to avail itself of the advantages of the school in the Chautauqua district, the residents and taxpayers thereof should share equitably in the cost of its support. The only effective way of bringing about a fair distribution of this burden is to consolidate the two districts, so that the taxable property in each district may be taxed equally for the maintenance of the school which serves the inhabitants of both districts in like manner and extent.

The respondent district superintendent, in answering the appellant's petition, states, in substance, that she refused to consolidate the districts on the grounds that it has been made to appear to her satisfaction that a majority of the qualified electors of the Harmony district are not in favor of the consolidation, and that she does not favor consolidation without the consent of the electors of the district proposed to be dissolved. It nowhere appears that the electors of the district are desirous of retaining the district so that the advantages of a home school may be obtained. There is an entire satisfaction with existing conditions whereby the children of the district are afforded all the valuable privileges of

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the efficient school system at Chautauqua, without sharing, on a basis of equality, the expense of maintaining such system. It may be inferred, reasonably, that the preference shown by many of the taxpayers of the Harmony district for a continuance of the district is based upon the fact that the cost to them will be less under the arrangement which has been made for the instruction of their children by contract with the Chautauqua district, than the amount they would be required to pay as taxes if the district was annexed to the Chautauqua district. This fact should be taken into consideration when the attitude of the district toward consolidation is under review.

It is not asserted by any of the interested parties that the educational advantages of the children of the Harmony district will be affected injuriously by the consolidation of the district with the Chautauqua district, which has for many years maintained the school which has been attended by such children. The only adverse circumstance which may be complained of by the electors in the Harmony district who oppose the consolidation is that the burden of taxation for school purposes in such district will be materially increased by the annexation of such district to the Chautauqua district.

As stated by the Commissioner of Education in *Matter of Ploss*, 4 State Dept. Rept. 647, decided April 17, 1915, in which case a district superintendent dissolved a common school district and annexed the territory thereof to a union free school district in which the children of the dissolved district had been instructed under contract for a number of years: "This circumstance is not in itself sufficient to warrant the reversal of the order of which the appellant complains. It is entirely just and equitable that the taxable property in this district should be assessed for the maintenance of the school which the children thereof have been permitted to attend for so long a time without any considerable expense. The order filed tends to equalize the burden of taxation among those who are directly benefited by the school maintained in the community. Such order meets with my approval and conforms to the general policy of this Department in bringing about

an equal distribution of the burden of taxation for school purposes."

The children of the Harmony district have been for many years well served by the school in the Chautauqua district. No reasonable objection exists for making permanent the continuance of this condition. Since the Harmony district has been and may continue to be adequately and effectively served by the school system in the Chautauqua district the property in both districts should be subject to tax for the maintenance of the school system which is available to both districts.

The appeal is sustained.

It is hereby ordered that Dorothy B. Connelly, district superintendent of schools of the third supervisory district of Chautauqua county, and James G. Pratt, district superintendent of schools of the fourth supervisory district of such county, be and they hereby are directed, upon obtaining the written consent of the trustee of school district No. 15, town of Harmony, Chautauqua county, and the board of education of union free school district No. 3, town of Chautauqua in such county, to dissolve said school district. No. 15, town of Harmony, and to annex the territory thereof to union free school district No. 3, town of Chautauqua, under and pursuant to the provisions of section 128 of the Education Law; such order to be executed jointly by the said superintendents within twenty days from the date of this decision, to take effect immediately.

ATTORNEY-GENERAL

In the Matter of Construing the Civil Service Law, Section 9,
in Relation to the Classification of the Position of Poundmaster
in the City of Mount Vernon

(Opinion dated August 3, 1918)

An officer appointed by the mayor and acting independently of any superior officer subject only to control by the mayor is not the head of a city department.

Section 9 of the Civil Service Law provides among other things that "the head or heads of any department of the government" shall be in the unclassified service and that officers not enumerated as unclassified shall be in the classified service. The poundmaster of Mt. Vernon not being a department head is included in the classified civil service of the city and the municipal civil service commission has no power to adopt a resolution declaring that the position in question shall be in the unclassified service. The resolution of the local board should be disregarded.

John C. Birdseye, Secretary, State Civil Service Commission, has submitted the following statement of facts:

"The office of poundmaster in the city of Mount Vernon, for many years classified by the municipal civil service commission, with the approval of the State Civil Service Commission, in the non-competitive class, was the subject of a resolution of the municipal civil service commission, on March 25, 1918, which provides:

"*Resolved*, That the position of poundmaster, now classed under the Rules of the Municipal Civil Service Commission of the City of Mount Vernon, New York, in the non-competitive class, be changed so that the said position shall be in the unclassified service for the reason that pursuant to Section 12, Article 2, of the Charter of the City of Mount Vernon, enacted March 22, 1892, said position was made an appointive office at \$500 per annum and the incumbent thereof is the head of the department.'"

Upon this statement of facts Mr. Birdseye has also submitted an inquiry, together with a request for an opinion thereon, as to whether this resolution was proper, valid or effective.

LEWIS, Attorney-General (by HINMAN, First Deputy).—I am satisfied that the Legislature in enacting section 9 of the Civil Service Law (originally enacted as section 8 of chapter 370 of the Laws of 1899) and providing therein that “the head or heads of any department of the government” should be in the unclassified service had no intention of keeping such positions as poundmaster out of the scope of the civil service examination system.

Section 9 of the Civil Service Law provides that certain officers, including “the head or heads of any department of the government” shall be in the unclassified service and that all officers not enumerated as in the unclassified service shall be in the classified service. Appointments in the classified service must be made in accordance with the provisions of the Civil Service Law and the rules promulgated thereunder and salaries may only be paid to persons in the classified service after proper certification by the Civil Service Commission under section 20 of the Civil Service Law.

The original Civil Service Law (Laws of 1883, chap. 354) provided in section 7 that certain State offices should not be subject to its operation and in section 8 that employees in certain city departments should not be subject to its general provisions. After amendments by chapter 681 of the Laws of 1894, section 1, and chapter 186 of the Laws of 1898, section 1, this part of those sections of the original statute was rephrased and became section 8 of the consolidated Civil Service Law (Laws of 1899, chap. 370); and it was in this consolidation for the first time that the phrase “the head or heads of any department of the government” was used in defining a group of positions or offices which were excepted from the operation of the Civil Service Law.

The Constitution provides (Art. V, § 9) that appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made

according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive. Offices and positions in the unclassified service fall into two classes: (a), those in which examination as a basis for appointment is impracticable and (b), those in which the examination is provided for under the Education Law rather than under the Civil Service Law. The Legislature has regarded examination as impracticable as a basis for selection of the officers in the first group, including "the head or heads of any department of the government." The reason is found in the importance of the offices. The incumbents should be selected because of their well-known ability and responsibility and because their appointing officers are held by the electorate responsible for their acts.

In a city it is obvious that the heads of such departments as the department of public safety, the department of public works, etc., hold positions of vital importance to the welfare of the community and for their behavior in office, including the appointment of subordinates, the mayor who appoints them is held responsible by the people and his power of appointment should be unrestricted by any requirement for examination; but it is also obvious that the same is not true of a pound keeper.

The charter of the city of Mount Vernon gives a list of officers to be appointed by the mayor. Laws of 1911, chap. 82, § 12. They are commissioner of public works, corporation counsel, city clerk, fire commissioner, commissioner of charities, health officer, one constable for each ward and the poundmaster. The fact that these are all mentioned in the same section or that they are all appointed by the mayor does not put them all in the same branch of the civil service. It is obvious that the fire commissioner is the head of a department. It is also obvious that a constable is not the head of a department and I think that it is almost as obvious that the poundmaster is not the head of a department.

I think "a department of the government" is meant by the Legislature to indicate one of the important branches in which there are under the "head" a number of subordinate officers and employees. In cities the police department and fire depart-

ment are obvious examples but I do not think that every independent officer who does not happen to be subordinate to any other officer is by reason of his independence the head of a department of the government.

Although the phrase "head of a department" was first used in the list of positions in the unclassified service with the consolidation of 1899, the phrase "head of a department" appeared in other parts of the Civil Service Law considerably earlier, particularly in those parts of the statute forbidding political influences over subordinates. In one of the acts I find the phrase "no head of a department or other appointing officer" and it seems to me that this phrase gives us the key to what was in the mind of the Legislature in putting heads of departments in the unclassified service. The heads of departments, as the Legislature uses the phrase, are "appointing officers" and because of their power of appointment, the ability to exercise which is obviously not susceptible of test by examination, they have been placed in the unclassified service. This power of appointment rather than independence of action is really what justifies placing the head of a department properly in the unclassified service; and consequently by his power of appointment rather than by his independence of action must we judge whether a certain officer is or is not "the head of a department of the government" within the meaning of the phrase as found in section 9 of the Civil Service Law.

The poundmaster of the city of Mount Vernon has no power of appointment. The pound is not a department of the government and he is not at the *head* of anything. He is merely an officer appointed by the mayor and acting independently of any superior officer, subject to control only by the mayor's power of removal. It is perfectly clear to me that the office of poundmaster is in the classified service under section 9 of the Civil Service Law and that the municipal civil service commission had no power to adopt the resolution quoted above and the resolution should be disregarded.

In the Matter of CONSTRUING SECTION 65 OF THE INSURANCE LAW in Reference to the Legality of Paying a Commission to an Insurance Broker upon Property Owned by the Insured When the Latter Is the Employer of Such Broker

(Opinion dated September 10, 1918)

Construing section 65 of the Insurance Law as to insurance brokers' commissions.

Section 65 of the Insurance Law prohibits an insurance company from paying to a licensed broker or agent a commission on insurance placed by him upon his own property or risk but does not prohibit the payment of a commission to a licensed broker where he is the employee of the insured named in the policy of insurance.

Hon. Jesse S. Phillips, Superintendent of Insurance, submitted the following inquiry, together with a request for an opinion thereon:

"Is an agent or a licensed broker prohibited from receiving a regular commission on business placed by him upon his own property or risk, and is a licensed broker prohibited from receiving a commission on business placed by him for his employer?"

LEWIS, Attorney-General (by HINMAN, First Deputy).—The answer to the inquiry involves the construction or interpretation of section 65 of the Insurance Law as amended by chapter 141 of the Laws of 1918.

The material part of that section is as follows: "No insurance corporation, association, partnership, Lloyds or individual underwriters authorized or permitted to do any insurance business within this state, or any officer, agent, solicitor or representative thereof, shall make any contract for such insurance, on property or risk located within this state, or against liability, casualty, accident or hazard that may arise or occur therein or agreement as to such contract, other than as plainly expressed in

the policy issued or to be issued thereon; nor shall any such corporation, association, partnership, Lloyds or individual underwriters, or officer, agent, solicitor or representative thereof, directly or indirectly, in any manner whatsoever, pay or allow or offer to pay or allow *to the insured named in such policy or to any employee of such insured*, as inducement to such insurance, or after the insurance shall have been effected, any rebate from the premium which is specified in the policy or any special favor or advantage in the dividends or other benefits to accrue thereon or any valuable consideration or inducement *whatever*, not specified in the policy or contract of insurance."

Certain agents and brokers' associations deliberately set to work to amend the Insurance Law so that an insurance agent could not procure a commission where the property insured was his own, or procure a commission on insurance written by him where his employer was the insured. And so section 65 was amended by chapter 141 of the Laws of 1918 in order that this purpose might be accomplished.

The question is now presented whether the amendment deliberately made for that purpose prevents a broker from procuring a commission on property insured in his own name and on property insured by him for his employer.

Taking up the first question whether a broker is entitled to a commission when he is the insured named in the policy, it will be noted that said section 65 of the Insurance Law, as it now stands, states: "Nor shall any such corporation [meaning the insurance corporation] * * * pay or allow * * * the insured named in such policy * * * as inducement to such insurance * * * any valuable consideration or inducement *whatever* not specified in the policy or contract of insurance."

Here the prohibition is directed against the insurance company. Further on in the same section there is a prohibition directed against the broker, his agent or representative, and provides: "Nor shall any insurance broker, his agent or representative or any other person * * * pay or allow or offer to pay or allow *to the insured named in such policy* * * * as

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inducement to such insurance, or any rebate from the premium which is specified in the policy."

If the Legislature had used the word "commission" in place of the words "any valuable consideration" or "inducement whatever" there would be very little room for doubt but that the object of the amendment had been accomplished. What did the Legislature mean by the words "any valuable consideration?" I think those words were intended to include a commission, and certainly a commission is a thing of value.

The purpose of this legislation was to require insurance companies to give equal terms to be fixed in the policy to all insurers of the same class and to give special favor to no one. Its operation was directed against considerations and inducements to a contract of insurance which are not specified in the policy. *McGee v. Fetler*, 75 Misc. Rep. 349.

If a broker is allowed a commission on property insured in his own name then he procures his insurance for a sum less than his neighbor who is not an agent. There would in effect be a deduction from the premium the amount with the deduction not being stated in the policy. This is the very thing which the legislation sought to prevent. If an application for insurance was placed with some other agent the company, of course, will have to pay that agent for his services. Nevertheless I think the Legislature had the right to absolutely prohibit the payment of a commission to an agent who insured his own property and that seems to be exactly what the Legislature undertook to do and has done as I read the statute quoted. The wisdom of the legislation is not under consideration.

My attention has been called to a letter written January 29, 1916, by the then counsel to the Superintendent of Insurance in which he held that as the law then stood a *bona fide* agent actually engaged in insurance business might obtain a commission upon premiums for policies written upon his own property. But that no doubt was the law before the amendment of this year which is now being considered.

The answer to the second question whether an agent may have

a commission where he is the employee and the insured is the employer, is attended with more difficulty. In the first place the promoters of the legislation intended to prohibit an insurance company from paying a commission in such a case. That was the very object sought by the amendment. The statute says: "Nor shall any such corporation, * * * pay * * * to any employee of such insured as an inducement to such insurance or after the insurance shall have been effected * * * any valuable consideration or inducement whatever not specified in the policy, or in the contract of insurance."

While the payment of a commission to an employee where the employer is the insured named in the policy does not work a rebate from the premium or lessen the amount of the premium stated in the policy, still it must be recognized that there would be a strong temptation on the part of the employee to give his employer the benefit of this commission or some part of it. As I said in considering the first question the words "any valuable consideration" must necessarily include a commission. The statute says that the insurance company shall not pay to any employee of such insured "as an inducement to such insurance or after the insurance shall have been effected, * * * any valuable consideration." This would seem to me to cover a case where the payment of the commission was not the inducement which prompted the insurance, and would prevent payment of a commission were it not for the words further on in the section. These words are as follows: "Nor shall this section prevent any such corporation or other insurer * * * from paying commissions to a licensed broker who shall have negotiated for insurance * * *." It seems to me that these words have upset the objects sought to be accomplished by the Legislature to prevent payment of a commission to an employee of the insured where the employee is a licensed broker. Certainly this exception controls over the rest of the act and permits a licensed broker to receive the commissions.

While the statute in question is crudely drawn and requires considerable scrutiny to determine just what is meant, still I think the object sought by the Legislature was accomplished so

far as the first question is concerned, but failed as to the second. I have not considered the question of its constitutionality but perhaps much might be said on this head. Until the courts pass upon this question, it is the duty of the State officials to assume it is constitutional.

I am therefore of the opinion that the amendment to said section 65 of the Insurance Law prohibits an insurance company from paying an agent or a licensed broker a commission on insurance placed by him on his own property or risk but does not prohibit the payment of a commission to such broker where he is the employee of the insured named in the policy.

In the Matter of CONSTRUING SECTION 184 OF THE STATE CHARITIES LAW and SECTION 2184 OF THE PENAL LAW Relative to the Commitment of Boys under Sixteen Years of Age

(Opinion dated September 16, 1918)

Consideration of a conflict between the provisions of section 184 of the State Charities Law and section 2184 of the Penal Law relative to the commitment of juveniles convicted of crime.

The question herein arose from an inquiry by the superintendent of the House of Refuge at Randall's Island, New York city, as to whether that institution could receive legally boys under sixteen years of age convicted of commission of crime in the rural counties of the State. A full discussion of the question is contained in the opinion, and the conflict between section 184 of the present State Charities Law and section 2184 of the Penal Law is passed upon. *Held*, that under the provisions of law as they now stand male persons under sixteen years of age, convicted of crime in the rural counties of the State, can be committed to or received at the house of refuge established by the managers of the Society for the Reformation of Juvenile Delinquents in the City of New York, whenever such institution is willing to receive them.

Edward C. Barber, Superintendent of New York House of Refuge at Randall's Island, New York city, submitted an inquiry, together with a request for an opinion thereon, as to whether boys from Cayuga county under sixteen years of age may be

received in the New York House of Refuge if the State Industrial School at Industry is overcrowded.

LEWIS, Attorney-General.— There is conflict between the provisions of section 184 of the State Charities Law and section 2184 of the Penal Law, in relation to the commitment of boys under sixteen years of age, convicted of crime, so far as the two sections apply to the commitment of boys convicted of crime in rural counties is concerned.

Section 184 of the State Charities Law provides: "Male children under the age of sixteen years may be committed from the rural counties of this state to the state agricultural and industrial school, at Industry, or the house of refuge established by the society for the reformation of juvenile delinquents; but such children in the counties of New York and Kings shall be committed to the house of refuge in New York city, established by such society."

Section 2184 of the Penal Law provides: "When a male person under the age of twelve years is convicted of a crime amounting to a felony, or where a male person of twelve years and under the age of sixteen years is convicted of a crime, the trial court may, instead of sentencing him to imprisonment in a state prison or in a penitentiary, direct him to be confined in a house of refuge under the provisions of the statute relating thereto. Where the conviction is had and the sentence is inflicted in the first, second, third or ninth judicial district, the place of confinement must be a house of refuge established by the managers of the society for the reformation of juvenile delinquents in the city of New York; where the conviction is had and the sentence is inflicted in any other district, the place of confinement must be in the state industrial school. * * * But nothing in this section shall affect any of the provisions contained in section twenty-one hundred and ninety-four."

It is stated in the communications of inquiry that the institution known as the State Agricultural and Industrial School at Industry is overcrowded and cannot at present receive boys under

sixteen years of age, but the House of Refuge for Juvenile Delinquents in New York city has a capacity for 1,000 with only 621 inmates.

The Industrial School at Industry was first established pursuant to the provisions of chapter 143 of the Laws of 1846, and was first known as "The Western House of Refuge for Juvenile Delinquents," and the managers were empowered to receive in such institution all male children under the age of eighteen years and all female children under the age of seventeen years, who should be legally committed thereto as vagrants or on conviction of any criminal offense by any court having authority to make such commitments. The act did not make any distinction in reference to the territory from which the commitments were made.

By chapter 24 of the Laws of 1850 it was provided that the several courts having criminal jurisdiction within the fourth, fifth, sixth, seventh and eighth judicial districts could commit juvenile delinquents to the Western House of Refuge, and those convicted within the first, second and third judicial districts should be committed to the House of Refuge established by the Society for the Reformation of Juvenile Delinquents in the City of New York.

Upon the revision of the State Charities Law, chapter 546, Laws of 1896, it was provided by section 124 that all children under the age of sixteen years might be committed as vagrants or upon conviction of any criminal offense from the "*rural* counties of this state" to the state industrial school or the house of refuge established by the society for the reformation of juvenile delinquents, but that all children in the counties of New York and Kings were to be committed to the house of refuge in New York city.

The same provision was substantially re-enacted by section 121, chapter 167 of the Laws of 1904, except that the word "children" was preceded by the word "male" and since that time the State Charities Law has continued to provide that all male children under the age of sixteen years from rural counties could be committed to either the State Industrial School or the

House of Refuge for Juvenile Delinquents in the City of New York. Commitments of all male children under sixteen years of age from New York and Kings counties were required to be made to the New York City House of Refuge. The act took effect June 1, 1904.

The section was again materially amended by chapter 449 of the Laws of 1910, and has since remained in the same condition as at present, and as hereinbefore partially quoted.

By chapter 676 of the Laws of 1881 (Penal Code) it was enacted by section 701 that all persons under the age of sixteen years convicted of a crime could be confined in a house of refuge, and if the conviction was had in the first, second or third judicial district the confinement should be in the House of Refuge for Juvenile Delinquents in the City of New York, and in any other district in the Western House of Refuge for Juvenile Delinquents. The section closed with this sentence: "But nothing in this section shall affect the provision contained in section 713."

It will be noticed that the provision relating to the commitments follows quite closely the provisions of chapter 24 of the Laws of 1850, which was afterwards merged in the State Charities Law, which was changed in 1896 (Chap. 546) by directing that all commitments from rural counties could be in either the Western House of Refuge or the New York City House of Refuge.

The above mentioned section 701 of the Penal Code was amended by chapter 554 of the Laws of 1896, but the same provision in reference to commitments from the first, second and third judicial districts was continued and the same provision in reference to commitments from other districts was continued. The section was again amended by chapter 388 of the Laws of 1904, and the same distinction as to commitments was kept up. The act took effect on June 1, 1904, the same time that the amended section 184 of the State Charities Law took effect, and since that time the apparent repugnancy in the two provisions has continued.

Section 701 of the Penal Code was incorporated in the Penal

Law as section 2184, and has remained in that condition without change, except the ninth judicial district is added to the territory from which commitments must be made to the house of refuge in the city of New York, and the further provision was included in such section: "Where a male person of the age of sixteen years and under the age of eighteen years has been convicted of juvenile delinquency or of a misdemeanor, the trial court may, instead of sentencing him to imprisonment in a state prison or in a penitentiary, direct him to be confined in a house of refuge established by the managers of the society for the reformation of juvenile delinquents in the city of New York; under the provisions of the statute relating thereto."

It will be observed that the new provision is for the commitment of boys between the ages of sixteen and eighteen to be made to the house of refuge in the city of New York whether they are convicted in a rural county or elsewhere, but that the old provision for commitments from the two distinct territories was not changed except to add the ninth district to the class from which commitments must be made to the New York City House of Refuge.

In tracing this legislation it becomes apparent that the conflict in the two provisions is largely the result of carelessness and the question now arises as to which act should prevail in reference to the commitment of male children under sixteen years of age from the rural counties to the house of refuge within the city of New York. I think it is apparent that the Legislature overlooked the State Charities Law and the difference in the two acts has crept into the Penal Law through oversight, as it hardly is conceivable that two conflicting acts would have been enacted by design. "The lawmakers cannot always foresee all the possible applications of the general language they use and it frequently becomes the duty of the courts in construing statutes to limit their operation so that they shall not produce absurd, unjust or inconvenient results not contemplated or intended." *L. S. & M. S. Ry. v. Roach*, 80 N. Y. 344.

This question was raised during the term of Attorney-General Jackson (Report of 1907, p. 569), and he held that the pro-

visions of the Penal Code would prevail as it was the later enactment. We find that since that opinion was written both statutes have been amended and while the amendement to the Penal Law was the last in point of time, it was only amended by adding the ninth district, and the further provision in reference to the commitment of boys between the ages of sixteen and eighteen years. The amendment to section 184 of the State Charities Law was a revision and recasting of the whole of that section, and indicates a clear intention on the part of the Legislature at that time (1910) to allow commitments to be made from rural counties to either house of refuge, and I do not think that purpose was changed by the amendment to the Penal Law made in 1913.

It is provided in the last part of section 2184 of the Penal Law that "nothing in this section shall affect any of the provisions contained in section twenty-one hundred and ninety-four," and when we turn to section 2194, it is seen that a person under sixteen years of age may, in the discretion of the court, be placed in charge of any suitable person or institution willing to receive him, so if the provisions of section 2184 are held to be prohibitive of sending children from rural counties to the house of refuge in the city of New York, here is a broad exception and the courts are given discretion to send such boys to any institution willing to receive them. As the Western House of Refuge is overcrowded and the managers of the New York city house are willing to receive such children, and there being plenty of room in the latter house, it is clear that children from any part of the State may be committed to the New York City House of Refuge, as long as the managers are willing to receive them, even if the provisions of section 2184 of the Penal Law could be held to otherwise prohibit the commitment of children from rural counties to the New York city institution.

I am therefore of the opinion that boys under sixteen years of age convicted of crime in the rural counties can be sent to the house of refuge established by the managers of the Society for the Reformation of Juvenile Delinquents in the City of New York, as long as such institution is willing to receive them.

IN the Matter of CONSTRUING CHAPTER 197 OF THE LAWS OF 1918 and CHAPTER 151 OF THE LAWS OF 1918, in Relation to Compensating the Fiscal Supervisor and Secretary of the State Board of Charities for Attending Sessions of the Commission for the Care of the Feeble-Minded

(Opinion dated September 18, 1918)

When two separate offices may be held by the one individual.

The Fiscal Supervisor and secretary of the State Board of Charities are entitled to have audited and paid to each of them the sum of \$15 for each and every day they may respectively attend the meetings of the Commission for the Care of the Feeble-Minded, not, however, exceeding the sum of \$1,000 to each, in any one fiscal year, in addition to the salaries which such officers receive for services rendered in their respective positions under the General Appropriation Act.

Hon. Frank R. Utter, Fiscal Supervisor, submitted an inquiry, together with a request for an opinion thereon, as follows:

“Can the accounts of the secretary of the State Board of Charities and the Fiscal Supervisor of State Charities be legally audited for payment by the State Comptroller at the rate of \$15 *per diem* compensation for each day actually engaged by such officers upon the business of the State Commission for the Care of the Feeble-Minded, as provided by chapter 197 of the Laws of 1918, provided the amount for either of them does not exceed the sum of \$1,000 in any one fiscal year?”

LEWIS, Attorney-General.—By chapter 197 of the Laws of 1918, a new commission was established for the care of the feeble-minded, to consist of three members, one of whom should be a reputable physician, a graduate of an incorporated medical college, with at least ten years' experience in the actual practice of his profession, to be the chairman of the Commission and to be appointed by the Governor with the advice and consent of the

Senate, for a term of three years. "The other members of the commission shall be the fiscal supervisor of the state charities and the secretary of the state board of charities."

The act added a new article, number 23, to the State Charities Law, and the sections thereof were numbered 480 to 486 inclusive. By section 481 it was provided:

"§ 481. Compensation of Commissioners.—The chairman of the commission shall receive an annual salary of five thousand dollars. The other members of the commission shall each receive fifteen dollars per day for each day's attendance at meetings, not to exceed one thousand dollars in any one fiscal year."

The act also directs how the chairman can be removed; how the office and clerical force of the Commission shall be provided; the authority for and the use of an official seal by the Commission; specifies the powers and duties of the Commission; defines the persons who are to be included under the term "feeble-minded," and makes an appropriation of \$25,000 for the purposes of the act.

The act became a law on April 13, 1918, and took effect July 1, 1918.

Pursuant to the provisions of such new article, the Governor on or about July 2, 1918, appointed Walter B. James, M. D., as chairman of such Commission, and it immediately organized and entered upon the discharge of its duties. The Commission has visited different institutions and held meetings in various other places than in the Capitol at Albany, and had conferences with men both within and without the State who are familiar with the many problems arising out of the care and treatment of the feeble-minded, and whose opinions the members deemed it necessary to secure in order to fully equip themselves for the duties of their respective positions. In doing so the various members incurred considerable expense which they have had to defray out of their personal funds.

By chapter 151 (General Appropriation Act), Laws of 1918, at page 240, an appropriation of \$6,000 was made for the salary of the Fiscal Supervisor of State Charities, and at page 237 of

the same act, an appropriation was made for the salary of the secretary of the State Board of Charities at the sum of \$6,000.

By section 8 of the same act, page 449, it is further provided in part, as follows: " * * * Any appropriations made by this act for salary, compensation or expenses shall be the salary, compensation or expenses for one year of the officer, employee, office, board, department, commission or bureau for whom the same is appropriated, notwithstanding existing provisions of any other statute fixing the annual salary, compensation or expenses of such officer or employee or the expenses of such officer, board, department, commission or bureau at a different amount, except that this provision shall not repeal or affect any other appropriation act, passed in the year nineteen hundred and eighteen, appropriating money to pay, during such year or the fiscal year beginning July first, nineteen hundred and eighteen, the amount of an increase in the salary, compensation or expenses of any such officer or employee made by a law enacted in such year."

The act became a law on April 4, 1918, and took effect immediately.

It has been intimated by the Comptroller that the above quoted portion of section 8 would prohibit the auditing of the bills of the Fiscal Supervisor and secretary of the State Board of Charities, for the fifteen dollars per day allowed to them by chapter 197, for each day's attendance at meetings of the board, as it is claimed " that the payment of such bills would constitute the payment of two separate and distinct salaries to the same officer or employee for the same services," and that such payment is forbidden by that part of section 8 of the General Appropriation Act above referred to.

The amount allowed by chapter 197 to the Fiscal Supervisor and secretary of the State Board of Charities is for new and additional duties imposed upon them for entirely separate and distinct work from that which they are required to transact in their respective positions. The Legislature provided for a Commission for the Care of the Feeble-Minded. It created work which neither of such officers were required or expected to perform in

the line of their usual duties, and was not in existence at the time of the enactment of the General Appropriation Act, and could not have been intended by the Legislature to be covered by the salaries provided by such act. The salaries fixed thereby were intended to be the compensation of such officers for the services which they were required to render as such and not in compensation for work and duties to be imposed upon them by a later statute.

At the time of the passage of chapter 197, the Legislature had full knowledge of the provisions of the General Appropriation Act and knew that the positions of the Fiscal Supervisor and secretary of the State Board of Charities were covered by the salaries named therein. With such knowledge they created a new Commission, assigned such officers to new and additional duties in such Commission and provided that they should be paid for such additional work the sum of \$15 for each day's attendance at meetings, not to exceed \$1,000 in any one fiscal year. The payment of this stipend cannot be tortured into two separate and distinct salaries to the same officers for the same services. One salary is for certain duties clearly outlined by statute, and the other, if it can be called a "salary," is compensation for other duties outside of their general work and provided by a separate and distinct statute passed at a later date by the same Legislature with full knowledge of its previous action. The intent is plain and manifest and the Fiscal Supervisor and secretary of the State Board of Charities are clearly entitled to have allowed and paid to them the sum of \$15 for each day's attendance at meetings of the Commission, not exceeding \$1,000 in any one fiscal year.

This is not the first instance in the State government where two separate offices have been established and provision made by statute for their being filled by the same individual, but none of them receive two salaries for the same work. In each case there are separate duties imposed and other work to be performed from that required in the discharge of the functions of the main office.

It is evident that the Legislature deemed it important and essential for the best interests of the State to secure the services of the Fiscal Supervisor and secretary of the State Board of Charities, with their experience and knowledge of the conditions and needs of the feeble-minded, but could hardly ask them to assume the additional obligations and work incident to such Commission, and defray their own expenses while acting with the same, without in some small way compensating them for the work and reimbursing them for their expenditures,—hence the provision under discussion was included in the act. There can be no doubt but that the action so taken was in the line of economy, as the small amount allowed, even if the whole \$2,000 is used up, will be much less than the State would have to pay for the same services if outside parties had been appointed upon the Commission instead of such officers.

I am, therefore, of the opinion that the Fiscal Supervisor and secretary of the State Board of Charities are entitled to have their accounts for each day's attendance at meetings of the Commission for the Care of the Feeble-Minded, audited, allowed and paid at the rate of \$15 per day, not exceeding \$1,000 each, in any one fiscal year.

IN THE MATTER OF CONSTRUING SECTIONS 102 AND 105 OF THE EXECUTIVE LAW, as to the Power of Certain Notaries Public to Take Acknowledgments and Affidavits to be Recorded in Several Counties

(Opinion dated September 18, 1918)

Limitations upon authority of notaries public.

A notary public has no power to take an affidavit or acknowledgment in a county in which he is not qualified, except for use in a county in which he is qualified. The qualification of a notary public will not validate an act done by him when he was not qualified to do it. The act of a notary performed in a county in which he is qualified may be received for record in any county in which he may be qualified at the time it is offered for record, whether or not he was qualified in that county at the time of performing the act.

Joseph M. Callahan, clerk of the county of Bronx, submitted an inquiry, together with a request for an opinion thereon, as follows:

"Has a notary public, appointed in a certain county and who has not qualified in a certain other county as provided in section 102 of the Executive Law, power to take the acknowledgment of a deed in the second county when the deed is to be recorded (a) in the second county, (b) in the first county, (c) in a third county wherein the notary is not qualified under section 102 of the Executive Law, (d) in another State?

"Would the situation be altered if, upon a date later than that of the execution and acknowledgment of an instrument, the notary were to qualify in the county wherein he had acted? In other words, is such qualification retroactive?"

LEWIS, Attorney-General.—Section 105 of the Executive Law defines the powers and duties of a notary public. After providing for the power to protest negotiable instruments it provides that in a county in and for which he shall have been appointed, and elsewhere as provided in section 102, he shall have the power to administer oaths and affirmations, to take affidavits and certify the acknowledgment and proof of deeds and other written instruments to be read in evidence or recorded in this State. It also provides that a county clerk's certificate authenticating his signature shall not be necessary to entitle any instrument to be recorded in the county in which the autograph signature and certificate of appointment and qualification of such notary shall have been filed pursuant to section 102.

Section 102 provides that a notary public appointed for any of the counties of the State, upon filing in the clerk's office of any other county of the State his autograph signature and certificate of the county clerk of the county for which he was appointed setting forth the fact of his appointment and qualification as such notary public may exercise all the functions of his office in the county in which such autograph signature and certificate of the county clerk are filed, with the same effect in all respects,

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as if the same were exercised in the county in which he resides and for which he was appointed.

A notary may take an acknowledgment under section 105 in the county for which he is appointed, or in any other county, for record in the county in which he is appointed or is qualified under section 102. He may take an acknowledgment under section 102 in any county in which he has filed his certificate and signature, but no power is conferred upon him to act in a county in which he has not filed his certificate for the purpose of having his act recorded in any county in which he has not filed his certificate. The Legislature from time to time has extended the jurisdiction of notaries but that jurisdiction is still limited and no power has been vested in a notary to act in a county where he is not qualified unless he be acting *for* a county where he is qualified. So, if a notary be qualified in a certain county he cannot act in a second county in which he is not qualified for the purpose of having his act recorded in that second county or in any third county where he is not qualified, but he is specifically empowered by section 105 to act in any county for the purpose of having his act recorded in a county where he is qualified.

Until a notary or any other officer is qualified to perform an act, any attempt upon his part to perform that act is nugatory and will not become effective upon his later becoming qualified, for his power to perform the act dates only from the time of his qualification.

It sometimes happens, however, that a notary acts in a county in which he is qualified; thereafter he files his certificate in a second county and then offers the act (performed theretofore in the first county) for record in the second county. In this case it should be received for record, for the act was valid when and where done and ordinarily would be receivable in the second county, if it carried a county clerk's certificate authenticating the signature of the notary (a certificate which necessarily would have been made after the notary's act) and section 105 provides that a county clerk's certificate shall not be necessary to entitle

an instrument to record in a county in which the autograph signature and certificate of appointment and qualification of such notary "shall have been filed pursuant to section 102 of this chapter." A certificate having been filed, the deed so proved is admissible to record without a county clerk's certificate.

Some of the other States of the Union will accept for record a deed proved before a New York notary without other evidence of his qualification than his seal and the date of expiration of his commission. Others require a county clerk's certificate. But no other State attempts to confer upon a New York notary powers greater than those conferred upon him by the State of New York. Consequently, if a notary acts in a county for which he was not appointed and in which he has not qualified under section 102, his act is nugatory where performed and certainly would not be acceptable in any other State.

In the Matter of CONSTRUING THE STATE CONSTITUTION,
ARTICLE VII, SECTIONS 7-10, Relative to Canal Lands within
the Forest Preserve Area

(Opinion dated October 2, 1918)

Lands within the Forest Preserve counties taken for canal purposes.
Such lands are under the Superintendent of Public Works.

The provisions of the Constitution (Art. VII, § 7) and of the statute (Conservation Law, § 62) defining the Forest Preserve, do not apply to lands within the Forest Preserve counties appropriated by the State from private ownership and paid for out of the proceeds of bonds issued pursuant to chapter 147 of the Laws of 1903, known as the Barge Canal Referendum Act, assuming that such lands have been appropriated in good faith for canal purposes.

Such lands are under the care, custody and control of the Superintendent of Public Works and not the Conservation Commission, and such Commission has no power to authorize a fish and game club to construct a rearing pool for the propagation of fish upon such land nor to permit the cutting of timber upon such lands by a military company for firewood.

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Hon. George D. Pratt, Conservation Commissioner, submitted the following inquiries, together with a request for an opinion thereon:

"1. Are the lands owned by the State within the Forest Preserve counties, which were appropriated pursuant to the provisions of chapter 147 of the Laws of 1903 for storage reservoirs at Hinckley and Delta 'for the purpose of improving the Erie canal,' including lands above the flow line at such reservoirs, a part of the Forest Preserve; and are such lands under the control and custody of the Conservation Commission?

"2. (a) If so, has the Commission the authority to permit a fish and game club to erect a dam on any of such land for the purpose of creating a rearing pool for the planting of fry for the propagation of fish?

"(b) Has the Commission the authority to permit Company F, Second Provisional Regiment, to cut trees for firewood during the coming winter on any of such lands?"

LEWIS, Attorney-General.—It appears by a communication from George D. Pratt, Conservation Commissioner, under date of July 27, 1918, that the land covered by the waters of the Hinckley and Delta reservoirs and adjacent thereto, including lands not covered by such waters, and all included in the acquisition of lands at those places, was appropriated by the State pursuant to the authority contained in chapter 147 of the Laws of 1903, for the improvement of the Erie canal, "and building storage reservoirs on the upper Mohawk near Delta and on West Canada Creek near Hinckley, with all necessary feeders for connecting these existing reservoirs with the improved canal." These reservoirs and the land not covered by water adjacent thereto, which was included in the appropriation, are all within the Forest Preserve counties. The Hinckley reservoir is located near Hinckley on the West Canada creek, and at the point of its dam and for a considerable distance above this creek it forms the dividing line between the counties of Oneida and Herkimer. The lands appropriated for the construction of both reservoirs

above the flow line of water are partially covered by timber and woods, and it is upon this land that authority is asked to permit a fish and game club to erect a dam for the purpose of creating a rearing pool for the planting of fry for the propagation of fish and also permission is asked by the Adjutant-General to cut trees for firewood during the coming winter upon such lands for the use of Company F, Second Provisional Regiment.

In 1885, the Forest Preserve was created by statute embracing "all lands now owned or which may be hereafter acquired by the State of New York within" certain counties and the area was extended by subsequent legislation. Laws of 1885, chap. 283; Laws of 1887, chap. 639; Laws of 1893, chap. 332. By chapter 707, Laws of 1892, the Forest Commission was given the care, custody and control of the Forest Preserve. In 1894, the constitutional provision was adopted by the people and went into effect January 1, 1895. It became article VII, section 7, of the Constitution and provided as follows: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

At the time of the taking effect of this section, the Forest Preserve included the counties in which both these reservoirs are located and in the absence of any other consideration, the lands appropriated for these reservoirs within the Forest Preserve counties came within the plain and unambiguous language of the Forest Preserve provision of the Constitution.

The constitutional provision with reference to the Forest Preserve marked the adoption of a permanent policy for the preservation of the Forest Preserve by including in the organic law a provision which had theretofore been evidenced only by a statute and was subject to amendment or abolition at the will of each succeeding Legislature.

There can be no doubt that the frequent and radical changes effected in the forest preservation laws by successive Legislatures strongly influenced the people to the adoption of the constitutional

provision and the incorporation therein of the essential features of forest protection, enlargement and preservation in a less mutable form than statutory law.

The manifest purpose of this constitutional amendment was to preserve the extensive area of wild lands in the northern counties of the State, forming the vast watershed between the Mohawk, Hudson and St. Lawrence rivers, in its natural state, as a haven of refuge for the rapidly decreasing game, a resort of pleasure and health for all the people and to conserve the water supply for the many and important lakes and streams having their location and origin in the area sought to be protected.

Pursuing this course, laws have since been enacted designed to sustain and advance this policy of forest protection and preservation which have been incorporated in what is now known as the Conservation Law.

Section 62 of that law defines the Forest Preserve as follows:

"The forest preserve shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except

"1. Lands within the limits of any village or city and

"2. Lands not wild lands and not situated within either the Adirondack Park or the Catskill Park acquired by the state on the foreclosure of mortgages made to loan commissioners." Laws of 1916, chap. 451, as amd. by Laws of 1917, chap. 266.

This section, it will be noted, follows closely the phraseology of the definition of the Forest Preserve as fixed by law at the time of taking effect of article VII, section 7, of the Constitution relating to the Forest Preserve.

We have then at the Hinckley and Delta reservoirs land in the Forest Preserve counties of Oneida and Herkimer precisely within the Forest Preserve area as defined on January 1, 1895, when the drastic provision of the Constitution became operative and as re-enacted in the Conservation Law now in force.

On the other hand, these lands were appropriated for canal purposes and purchased with funds raised pursuant to the authority of an act which before taking effect received the direct approval of the people upon a referendum. That these lands were acquired by the State for canal purposes solely and not in any sense to increase the Forest Preserve, there can be no question.

The work of constructing a canal system in this State was begun long before the work of preserving the forests. Prior to the Constitution of 1846, the State had constructed canals. The construction of these canals was the great public work of the early part of that century. By the Constitution of 1846, provision was made with reference to canal revenues and debts and against the sale, lease or other disposition of such canals.

The prohibition against the sale, lease or other disposition of the canals of the State is still contained in the Constitution, section 8 of article VII, as follows: "The Legislature shall not sell, lease or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, the Cayuga and Seneca canal, the Black River canal; but they shall remain the property of the state and under its management forever."

This inhibition, however, has been construed to prevent the sale, leasing or other transfer of the canals as a means of transportation and not as forbidding the sale of canal lands when actually abandoned for canal purposes. *Pelo v. Stevens*, 66 Misc. Rep. 35, 41; *Sweet v. City of Syracuse*, 129 N. Y. 333, 341.

Hence the lands in question acquired for canal purposes must "remain the property of the state and under its management forever" so long as they shall be devoted to or connected with communication or transportation by means of the canal system of the State. Judge Foote, in *Pelo v. Stevens*, *supra*, at page 41, expresses the opinion that "no doubt lands of the present canal rendered no longer useful for canal purposes may after the improvement is made be disposed of by the state under existing laws without infringing the prohibition of the sale of the canals provided the navigable communication intended by the Constitution is still preserved to the people."

In 1894, at the very time of adding the Forest Preserve provision to the Constitution, there was inserted in the Constitution a new provision relating to the canals of the State which became section 10 of article VII, and which provides as follows: "The canals may be improved in such manner as the Legislature shall provide by law. A debt may be authorized for that purpose in the mode prescribed by section 4 of this article, or the cost of such improvement may be defrayed by the appropriation of funds from the state treasury or by equitable annual tax."

From this we may deduce that the Constitution makers gave equal dignity and force to the work of the canals and the Forest Preserve and with reference to the former, gave to the Legislature unlimited authority as to the manner of improving the canals.

It seems clear to me that this canal provision of the Constitution furnishes an exception to the Forest Preserve article, and that the two must be read together. The Constitution must be construed as a whole. In seeking the intent of the Constitution, words absolute in themselves and the broadest and most comprehensive language may be qualified and restricted by reference to other parts of the Constitution or by the facts to which they relate. However direct, plain and unambiguous, considered by itself, the Forest Preserve section may be, if the canal provision is inconsistent with the literal and unrestricted interpretation of the Forest Preserve section, it is our duty to give adequate force to the canal provisions as well as the Forest Preserve provisions by harmonizing the two with each other as well as with the whole intention of the Constitution makers.

So far as the Legislature has made provision for the canal improvement and has appropriated lands therefor, such improvement must be deemed to be a separate and distinct public work and the lands purchased in good faith and sound discretion for canal purposes are canal lands and not part of the Forest Preserve. It is possible to see how the abuse of the canal provision of the Constitution might lead to evasion of the Forest Preserve provision, but there is no evidence of bad faith or abuse

of discretion produced here, and for the purposes of this discussion I shall assume that none exists.

Moreover, the referendum act (Laws of 1903, chap. 147) under which these lands were acquired gave to the State officer charged with the duty of appropriation broad discretionary power to appropriate lands, structures and waters "the appropriation of which for the use of the improved canals and for the purposes of the work and improvement authorized by this act, shall in his judgment be necessary." In *Jerome v. Ross*, 7 Johns. Ch. 315, 339, quoted with approval in *People v. Fisher*, 190 N. Y. 468, it has been held that the word "necessary" does not mean absolute and indispensable or that without the use of the land in the given case the work could not possibly go on. "There must, from the reason of the thing and the nature of the case, be great latitude of discretion in the selection of the lands and the materials."

All of the lands in question were paid for out of the proceeds of the bond issue authorized by the referendum act (Laws of 1903, chap. 147). The carrying out of all of the basic provisions of this act must be deemed the condition precedent to the expenditure of these moneys. One of the basic provisions of a referendum act authorizing a bond issue is the constitutional requirement that it shall distinctly specify the single work or object for which the debt is to be contracted. Const. art. VII, § 4. The specific work or object in this case was the canal improvement and the appropriation of lands therefor, including expressly the lands for the Hinckley and Delta reservoirs. The lands in question could not be appropriated for the Forest Preserve with the moneys authorized for canal improvement and for the same reason there can be no automatic diversion of such lands to the Forest Preserve after their appropriation for canal improvement. It would be a violation of the referendum act which the Legislature was expressly authorized to pass for the purpose of such canal improvement by section 10 of article VII of the Constitution. If such lands should later become a part of the Forest Preserve it would be because of some other compelling reason, possibly such as the abandonment of the lands for canal purposes by

formal action of the duly authorized board or officer of the State. But even if abandoned for canal purposes, the referendum act, as amended by chapter 244, Laws of 1909, expressly provides in section 5 thereof that where lands appropriated for the improvement are found no longer necessary for canal purposes, the Superintendent of Public Works, with the approval of the Canal Board, may reconvey the same to the owner from whom the property so deemed to be unnecessary for canal purposes was taken, his heirs, successors in interest or assigns, upon such terms as the Canal Board shall deem just. Whether this provision of the statute would be effective to dispose of these canal lands in accordance with its terms in the face of the constitutional provision relating to the Forest Preserve, it is not necessary to decide at this time, since there has been no abandonment of the lands in question for canal purposes.

The fact that some of the lands purchased for these reservoirs are not presently utilized for the purpose of flowing them does not preclude them from being considered canal lands. It is certainly capable of demonstration that the ownership of lands above the present flow line is valuable to the State for canal purposes and the custody and control of such lands should lie with the board or officer charged with the care, custody and control of the canal system. Common business prudence might well dictate the appropriation of lands at a reasonable distance above the flow line in order to afford suitable avenues of approach to all parts of the reservoir by those charged with its custody, to protect it from damage, to repair the reservoir, its dams and other structures, to obtain materials for such repair and improvement, including the cutting of trees for that purpose, and to protect and improve the streams feeding into such reservoir.

Thus it seems to me that the Constitution read as a whole has given the Legislature full power to determine the manner of improving the canals of the State and that this power is not impaired by the Forest Preserve provisions of the Constitution. It remains to consider what disposition the Legislature has made with reference to the care, custody and control of the canal lands, structures and waters.

The office of Superintendent of Public Works was created by section 3 of article V of the Constitution, and by that section the powers and duties of the office include the execution of all laws relating to the construction and improvement of the canals, except so far as the execution thereof shall be confided to the State Engineer and Surveyor. This constitutional provision, subject to the control of the Legislature, authorizes the Superintendent of Public Works to make rules and regulations for the navigation or use of the canals.

The scope of the work imposed upon the Superintendent of Public Works is more definitely fixed by the Canal Law, section 33, subdivisions 1, 10 and 12 of which provide as follows:

"General powers and duties of superintendent.—The superintendent of public works shall:

"1. Have the general care and superintendence of the canals; enforce the faithful execution and observance of the canal law by all persons, and as a member of the canal board be entitled to one vote therein.

"10. Make all such canals, feeders, locks, dams, aqueducts and other works as he deems the construction of every canal authorized by law to require; and enter upon, take possession of and use all lands, streams and water, the appropriation of which for the use of such canals and works is, in his judgment, necessary.

"12. Make all necessary rules and regulations for the safe and speedy navigation, protection and maintenance of the canals and the structures thereof, for the government of all employees under his control engaged in their construction, improvement, repair and navigation, and for the payment for tools, materials and labor; * * *."

There can be no question that these statutory and constitutional provisions give the Superintendent of Public Works, and him only, full power and authority to exercise general care of the canals of the State, together with all their existing works and structures when the construction of such canals, works and structures is complete. In the construction and improvement of such

canals, he shares to some extent the power and responsibility of the execution of the laws with the State Engineer and Surveyor; but the finished waterway available as a highway of commerce and all auxiliary structures necessary or desirable for the successful operation of such system are solely under his care, management and control.

Both reservoirs which, I understand, are completed, form a part of the canal system and so long as they are used as feeders to the Barge canal are subject to the control and under the care of the Superintendent of Public Works and no other State administrative officer can so interfere with such reservoirs or with the lands which were appropriated for such reservoirs or which are now or may hereafter be actually applied to such purposes as to prevent the full and complete utilization of such lands for canal purposes.

The Conservation Law, section 50, prescribes the powers and duties of the Conservation Commission. That section provides in part as follows:

"The commission shall, for the purpose of carrying out the provisions of this article, have the following power, duty and authority:

"1. Have the care, custody and control of the several preserves, parks and other state lands described in this article.

"2. Make necessary rules and regulations to secure proper enforcement of the provisions hereof.

"8. Examine the forest lands under the charge of the several state institutions, boards or other management for the purpose of advising and co-operating in securing proper forest management of such lands."

This is the Forest Preserve article of the Conservation Law and section 62, which is found in this article and to which reference has already been made, describes the Forest Preserve. As we have already seen, the canal provision of the Constitution is of equal dignity and force with the Forest Preserve provision of the Constitution and should be treated as an exception to the latter so far as lands, structures and waters appropriated for canal improvement have been acquired in good faith for such

improvement. Subdivisions 1 and 2 of section 50 of the Conservation Law, therefore, have no application to the lands in question connected with these two canal reservoirs.

Subdivision 8 of section 50, which is a new provision added by chapter 451 of the Laws of 1916, lends force by legislative construction to the argument advanced in favor of the proposition that the sole management of the canal lands lies with the Superintendent of Public Works. Subdivision 8 simply gives to the Conservation Commission the power of examination of forest lands under other management for the purpose of advising and co-operating, rather than interfering with or controlling the use of such canal lands.

In the case of *People v. Fisher*, 190 N. Y. 468, the court expressly disclaimed any intention to determine the question of conflict of jurisdiction between the State officers involving the use of State lands in the Forest Preserve counties which it might be desirable to devote to purposes other than as wild forest lands. The *Fisher* case, therefore, is not a controlling authority upon the question raised here. The Court of Appeals was able to say at that time, and for the purposes of that case, that the State lands in question were wild forest lands within the Forest Preserve counties and that their retention as wild forest lands was for purposes and objects directly connected with the Forest Preserve sufficiently to sustain the bringing of an action by that Commission to recover damages for trespass or waste on such lands. No question of constitutional law was apparently raised involving the canal and Forest Preserve provisions of the Constitution and whatever authority the Forest, Fish and Game Commission may have had over such canal lands at that time, it is clear that under section 50, subdivision 8, of the Conservation Law, as added in 1916, the present duty of the Conservation Commission is confined to examination and advice with reference to the management of forest lands where such lands have been placed under the charge of the several State institutions, boards or other management.

The lands appropriated for canal or reservoir purposes at Hinckley and Delta are under the sole supervision and control

of the Superintendent of Public Works and are, therefore, under "other management" than the Conservation Commission. This is clearly revealed by reference to section 3 of article V of the Constitution under which the Superintendent of Public Works is charged with the duties of management of this property and is given authority to make rules and regulations subject to legislative control for the use of the canals. It is also shown by the provisions of the statute, section 33 of the Canal Law, particularly subdivisions 10 and 12, by which the Superintendent of Public Works is given authority to "use" all lands, streams and water "the appropriation of which for the use of such canals and works is in his judgment necessary" and to make all necessary rules and regulations "for the safe and speedy navigation, protection and maintenance of the canals and of the structures thereof."

The Legislature has provided, in section 16 of the Canal Law, that the Canal Board may, with the consent of the Superintendent of Public Works, grant permission "for the use of any of the state lands adjoining any reservoir or of any island or islands in any reservoir for a public pleasure resort and for the erection of buildings thereon, upon such terms, conditions, covenants and restrictions as the board may deem proper."

Provision has also been made in section 111 of the Canal Law for the leasing of surplus waters arising from canal improvements where such surplus water is not necessary for the navigation or operation of the canals upon the condition that such leases may be terminated whenever the Superintendent of Public Works shall deem the whole or any part of such water desirable for the purposes of such canals.

If these canal lands within the Forest Preserve counties are a part of the Forest Preserve and subject to the inhibition of the Constitution with reference to lands of the State within such counties being preserved forever as wild forest lands, it is plain that the above provisions of the Canal Law would be inoperative within the Forest Preserve counties in which most of these reservoirs and surplus waters would be found. These illustrations reveal to some extent the importance of the fundamental propo-

sition involved in the determination of this question, and while not decisive of the question tend to give pause in the determination of it. I would hesitate to hold that such provisions were in violation of the Forest Preserve provisions of the Constitution so far as the lands involved were located in the Forest Preserve counties in the face of such legislative interpretation that the canal system of the State is a great public work separate and apart from the Forest Preserve.

There have been opinions inclining to a qualification and restriction of the Forest Preserve provision of the Constitution. In an opinion for the State Historian, given February 21, 1912, Attorney-General Carmody held that land acquired under authority of chapter 391 of the Laws of 1900, entitled "An Act to provide for acquiring and care of lands to commemorate the Battle of Lake George and making an appropriation therefor," did not upon the title of such lands vesting in the State become a part of the Forest Preserve and subject to the constitutional provision relating thereto, although located within a Forest Preserve county. He said: "I think where the statute authorizing the purchase of lands for the State plainly indicated that such land is to be used for a definite purpose which is inconsistent with its use as wild forest lands, where such purpose is one which the State had for many years previous to the enactment of the law defining the forest preserve recognized as necessary or proper in promoting the ends of government, that the provisions of law defining the forest preserve should not be held to apply so as to bring it within the constitutional provisions relating to the forest preserve."

In Matter of Long Sault Development Company, 158 App. Div. 398, the question of the power of the Legislature to authorize the transfer to a corporation of the bed of the St. Lawrence river arose and, at page 404, Justice Smith said: "Said section 100 specifies all lands owned by the State within certain counties, with certain exceptions, as being a part of the Forest Preserve, but we do not think that the intent was thereby to include lands lying under the water in the St. Lawrence river which are separated by many miles from the lands above water

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owned by the State in this county. The constitutional provision refers to the lands of the Forest Preserve as 'wild forest lands,' and while this description might include lands under water owned by the State adjoining such 'wild forest lands,' it would hardly seem to include other lands under water at a distance from any forests whatever."

Upon appeal to the Court of Appeals (212 N. Y. 1) Judge Collin, at page 27, substantially agreed with the reasoning of the Appellate Division but the majority of the court condemned the exercise of such power by the Legislature upon the ground that the State could not relinquish its sovereignty over navigable streams in such manner as to prevent its improving navigation, such conclusion being founded on the provision of the act in which land under water was sought to be transferred, to the effect that: "Such navigation (of the St. Lawrence river) shall be preserved in as good condition as, if not better than, the same is at present."

This clause of the act, it was held, would prevent any action by the State for improving the navigability of the river at the points involved. The court apparently did not consider the application of article VII, section 7, of the Constitution in reaching its determination except in the dissenting opinion of Judge Collin, who concluded that the lands under the river at the locality designated were not a part of the Forest Preserve as fixed by law when the constitutional provision was adopted.

In *People ex rel. N. Y. C., etc., R. R. Co. v. Walsh*, 211 N. Y. 90, application was made for a writ of mandamus to compel, among other things, the conveyance to the relator of certain lands in the town of Schuyler, Herkimer county, which were acquired for canal purposes. Herkimer county is a Forest Preserve county and the land in question was not within the limits of any village or city nor so far as appears in the record of the case was it land "not wild lands" acquired on foreclosure of loan commissioners' mortgages. The unusual character of this appropriation is indicated by observations in the brief of the defendants, respondents, in the Court of Appeals where it is said: "In order to secure the required elevation of its bridge over the

canal it is considered necessary that the embankment east and west of the blue line of the canal be widened at the base; and inasmuch as the railroad company had not sufficient width in its right of way to accomplish this, the contract provides that the state shall acquire *from third parties* two strips of land on either side of its tracks and extending over the canal and several hundred feet east and west of the blue line of the canal and convey the same to relator. In other words, these parcels are to be acquired not for canal purposes but merely in order to negotiate a settlement of the claim of the railroad company."

Neither in the briefs of counsel nor in the opinion of the court was the application of the Forest Preserve section of the Constitution to the lands in question considered. Nevertheless here was land owned by the State not within the exceptions of the definition of the Forest Preserve but on the contrary precisely within the limitations of that definition so far as location and character were concerned. The opinion in this case therefore cannot be considered as a binding authority upon this proposition.

In 1905, Attorney-General Mayer, in treating of the clearing of forests to prevent fire, said: "It was the clear intention of the Constitution to prevent the sale of timber but I think that the State in the exercise of its police power has the same right to protect a citizen resident in the Adirondack region from the danger of a burning forest, or of a forest which having been burned, is a continuing menace, in precisely the same way that the State or its municipalities, through the proper agencies, may destroy a burning building or tear down the walls of a building which has been burned. In other words, I am of the opinion that it was never intended that the constitutional provision should prevent the State from exercising the highest attribute of sovereignty—the protection of the life and property of its citizens. Had the officials themselves undertaken at the State's expense the clearing of the forest at the points of danger for the purpose of protecting life and property, the difficulties which ensued through the methods adopted and to be hereafter referred to, would not have occurred and it is safe to say that there would

have been no criticism of such a course by thoughtful citizens." Opinions of Attorney-General, 1905, pp. 247, 253.

If it can be held to be outside the spirit and intent of the Forest Preserve provision of the Constitution to carry on governmental work recognized as necessary or proper in promoting the ends of government such as the erection of a battlefield monument or disposing of lands under water far removed from wild forest lands or exercising the police power of the State in the protection of the life and property of citizens, I am of the opinion, after carefully considering the letter and purpose of the Forest Preserve provision of the Constitution in connection with the canal improvement provision of the Constitution, that the lands at the Hinckley and Delta reservoirs, including the lands between the flow line and boundary of the area appropriated, are not a part of the Forest Preserve and that the provisions of the Constitution defining the Forest Preserve should not be held to apply to such lands. Moreover, I am of the opinion that under the statutes relating to the canals and the forests, the lands in question are under the care, supervision and control of the Superintendent of Public Works and not the Conservation Commission.

Article VII, section 7, of the Constitution, relating to the Forest Preserve, was amended in 1913 by the addition of the following: "But the Legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, for the canals of the State and to regulate the flow of streams. Such reservoirs shall be constructed under and controlled by the State, but such work shall not be undertaken until the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination, that such lands are required for such public use. * * *."

This amendment took effect January 1, 1914. Such change in the Constitution, it will be observed, was prospective and not retrospective. It applied thereafter to the construction of reservoirs on lands owned by the State in the Forest Preserve at the

time of such construction. The reservoirs in question at Hinkley and Delta were built on lands acquired prior to 1914 by the use of canal moneys for canal purposes and the lands so used were not carved out of the State lands already owned by the State within the Forest Preserve. It is my opinion that the amendment taking effect January 1, 1914, cannot be construed as relating to the reservoirs in question but to such reservoirs as might thereafter be constructed on lands already owned by the State within the Forest Preserve and a part of that preserve. It did not modify the power of the Legislature to acquire lands for canal purposes within the Forest Preserve counties but was intended as a limitation upon the Forest Preserve article in order that the Forest Preserve might be utilized as an additional source of relief for municipal water supply for the canals of the State and to regulate the flow of streams.

Therefore, my answer to the first question is that the lands in question are not a part of the Forest Preserve but are canal lands under the custody and control of the Superintendent of Public Works, and it follows that the Conservation Commission has no authority to issue any permits for the use of such lands.

IN the Matter of CONSTRUING THE STATE CONSTITUTION, ARTICLE XI, SECTION 2, and SECTION 42 OF THE MILITARY LAW, Added by Chapter 239 of the Laws of 1918, Relative to the Legality of Enlisting in the New York Guard Minors above the Age of Sixteen Years without the Consent of Their Parents

(Opinion dated October 7, 1918)

Enlistment of minors above the age of sixteen in the New York Guard without the consent of their parents.

The Constitution of the State of New York, article XI, section 2, after defining the militia, provides: "The Legislature may provide for the enlistment into the active force of such other persons as may make application to be so enlisted." The Military Law, section 42, added by the Laws of 1918, chapter 239, provides: "The qualifications for, and

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term of enlistment in, the New York Guard and the form of oath to be taken upon enlistment shall be prescribed in regulations." The New York Guard is not subject to all the limitations of the National Guard, for section 42 of the Military Law, while it carries the general rule that the provisions of the Military Law, in respect to the enlisted men of the National Guard, shall apply to the enlisted men of the New York Guard, adds "except as otherwise prescribed by this article" and the same section as quoted above otherwise prescribes the qualifications. In the absence of a specific requirement in the statute or regulations that the consent of parents be obtained to enlistment of minors, such consent is unnecessary and an enlistment without it would be valid both against the enlisted man and against his parents or guardians.

Lieut.-Colonel Edward J. Westcott, acting Adjutant-General, submitted an inquiry, together with a request for an opinion thereon, as to whether, assuming that the regulations contain no such requirement, it is legally necessary to secure the consent of parents to the enlistment in the New York Guard of young men between the ages of sixteen and twenty-one.

LEWIS, Attorney-General.—The Constitution of the State of New York, after defining the militia, provides: "The legislature may provide for the enlistment into the active force of such other persons as may make application to be so enlisted." Art. XI, § 2.

Section 42 of the Military Law (added by Laws of 1918, chap. 239) provides: "The qualifications for, and term of enlistment in, the New York guard and the form of oath to be taken upon enlistment shall be prescribed in regulations."

The Constitution authorizes the Legislature to provide for the enlistment of persons not members of the militia, and the Legislature, by providing that the qualifications for enlistment shall be prescribed in regulations, delegates to the military authorities the power and duty of determining those who may and those who may not be enlisted. The military authorities have provided by regulations that citizens and those having declared their intention of becoming citizens may be enlisted if over the age of sixteen years.

Section 95 of the Military Law, as amended in 1917, provides that the qualifications for enlistment in the *National* Guard shall

be the same as those prescribed for enlistment in the regular army. But the New York Guard is not subject to all the limitations of the National Guard, for section 42 of the Military Law, while it carries the general rule that the provisions of the Military Law in respect to enlisted men of the National Guard shall apply to enlisted men of the New York Guard, goes on to say: "Except as otherwise prescribed by this article" and the same section as quoted above otherwise prescribes the qualifications.

It has been customary in the New York Guard to require the consent of a boy's parents before enlisting him. This undoubtedly grew out of the custom which originated in the National Guard under section 95 of the Military Law which formerly provided, among other things, that: "No minor shall be enlisted without the written consent of his parent or guardian." It is to be noted that this language was eliminated from section 95 by the amendment effected by chapter 644 of the Laws of 1917.

The regulations of the New York Guard provided, until recently, that parents' consent should be secured before enlisting any boy between the ages of sixteen and eighteen in the New York Guard. G. O. No. 23, A. G. O. 1918. It seems that this regulation has been or is about to be withdrawn for the Adjutant-General's inquiry is as to the right to enlist such boys without their parents' consent, in the absence of any such regulations.

Congress has regulated enlistment in the United States Army by acts passed from time to time but such acts have practically always provided in what case the consent of parents is necessary to the enlistment of minors. Under some of the early statutes the enlistment of a minor was illegal unless made with the consent of his parents, while under others such consent was necessary only when the minor was under eighteen years of age. 5 C. J. 299.

In the navy and marine corps there have been similar rules. *Id.* 300.

Since an enlistment is not merely a contract but effects a change of status, it follows that as a general rule it is not like ordinary contracts voidable by an infant or by his parents or guardian. *Id.* 300.

The principles of the common law with respect to voluntary enlistment of minors are well stated in the case of *Lanahan v. Birge*, 30 Conn. 438-443, where the court says:

"It is a fundamental principle of national law, essential to national life, that every citizen, whether of age to make contracts generally or not, is under obligation to serve and defend the constituted authorities of the State and nation, and for that purpose to bear arms, when of sufficient age and capacity to do so, and when such service is lawfully required of him. The power to enforce that obligation, so far as the necessities of the State may require, is an incident of State sovereignty, and the subject of State constitutional and statutory regulations. * * *

"Enlistment is but another and less objectionable method of securing the military service required by the State and due from the citizen; and the same essential principles of public policy and necessity, which impose the obligation to serve, and confer the power to enforce that obligation, require that the minor who is subject to military draft, should be at liberty to enlist, when called upon in that form to render the military service which the State requires. It may indeed be for his interest to do so, rather than be subject to draft, as it certainly is sound policy in the government that he should. But however that may be, the obligation to serve, and the right to require the service, exist and are paramount. What a minor can be compelled to do, he may contract to do, or do voluntarily; and if he is lawfully subject to military duty, and is lawfully called upon to enlist, his contract of enlistment is as valid and binding as that of an adult.

"Although it is the policy of the law to give to a parent a right to the service and control of the person of a minor child until he has attained the age which the law has fixed for his emancipation, yet that right and authority are holden in subordination to those paramount rights and powers of the State which are essential to the maintenance of civil society and civil government."

Our State Constitution specifically authorizes the enlistment of persons outside the militia as therein defined and the principles affecting the voluntary enlistment of persons subject to draft

will apply equally well to other persons whose voluntary enlistment is duly authorized in accordance with the constitutional provision.

Under the Federal statutes where the consent of parents was required to the enlistment of minors, it was held that the enlistment of a minor without such consent should not be avoided by the minor but only by the parents, the right being one specifically granted to the parent by legislation. It would follow that in the absence of legislation there is no such right. The Supreme Court of the United States said, in the case of *Morrissey*, 137 U. S. 157-159: "The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the Legislature. *United States v. Bainbridge*, 1 Mason, 71; *Wassum v. Feeney*, 121 Mass. 93, 95. Congress has declared that minors over the age of sixteen are capable of entering the military service, and undertaking and performing its duties. An enlistment is not a contract only, but effects a change of status. *Grimley' Case*, *ante*, 147. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. *The King v. The Inhabitants of Rotherford Greys*, 2 Dow. & Ryl. 628, 634; S. C., 1 B. & C. 345, 350; *The King v. Inhabitants of Lytchet Matravers*, 1 Man. & Ryl. 25, 31; S. C., 7 B. & C. 226, 231; *Commonwealth v. Gamble*, 11 S. & R. 93; *United States v. Blakeney*, 3 Grattan, 405, 411-413."

These and other authorities satisfy me that in the absence of a specific requirement in the statute or regulations that the consent of parents be obtained to enlistments of minors, such consent is unnecessary and an enlistment without it would be valid both against the enlisted man and against his parents or guardians.

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**IN THE MATTER OF CONSTRUING THE CODE OF CIVIL PROCEDURE,
SECTIONS 1391 AND 1393, AND SECTION 2-a OF THE FINANCE
LAW, Relative to Garnishee Proceedings and Executions against
the Salary of a Military Officer**

(Opinion dated October 15, 1918)

Garnishee proceedings against the salary of a military officer of the State of New York.

The salary of a military officer of the State of New York is subject to execution in garnishee proceedings under section 1391 of the Code of Civil Procedure, such officer being within the provisions of section 2-a of the State Finance Law. The pay of non-commissioned officers, musicians and privates is exempt from execution under Code of Civil Procedure, section 1393.

Lieut.-Colonel Edward J. Westcott, acting Adjutant-General, submitted an inquiry, together with a request for an opinion thereon, as to whether execution lies against the military pay of an officer of the military forces of the State.

LEWIS, Attorney-General.—Section 1391 of the Code of Civil Procedure provides for a proceeding commonly known as a garnishee proceeding for execution of a judgment which has been returned wholly or partly unsatisfied against the wages, debts, earnings, salary, income from trust funds or profits of the judgment debtor, where the amount of such wages, etc., is twelve dollars or more per week; 10 per cent of such wages, etc., being taken in execution from every payment made until the judgment, etc., is satisfied.

In the absence of specific provision making wages, salaries, etc., paid by the State subject to such execution, it has been universally held that a garnishee order could not properly be directed to a State officer. Attorney-General O'Malley rendered an opinion to the Comptroller to that effect in 1909 and in 1910 the Legislature added section 2-a to the State Finance Law. That section reads as follows: "The salaries of all officers of the state, and the wages of all employees thereof shall be due from and payable by the state twice each month, on the first and six-

teenth days thereof, except where such days fall upon Sunday or a legal holiday when such payments shall be made upon the succeeding business day. Said salaries and wages shall be subject to all the provisions of section thirteen hundred and ninety-one of the code of civil procedure applicable to any wages, debts, earnings or salary, as if the state and the said wages and salary due and payable by it had been particularly designated therein. The provisions of this section shall be deemed to supersede any other provision of this chapter or of any general or special law inconsistent herewith."

The section refers to "the salaries of all officers of the State" and I see no possible basis for argument to the effect that military officers are not included among "all officers of the State."

I am, therefore, of the opinion that salaries of military officers are subject to the provisions of section 1391 of the Code of Civil Procedure.

The pay of noncommissioned officers, musicians and privates in the military service of the State of New York, however, is specifically exempted from execution by section 1393 of the Code of Civil Procedure and, consequently, is not subject to garnishee proceedings.

In the Matter of CONSTRUING THE TAX LAW, SECTIONS 221-b, 260, 330 and 338, as to Investment and Transfer Taxes

(Opinion dated October 19, 1918)

Bonds secured by a mortgage upon which the mortgage tax was fully paid at the time of recording are not subject to taxation under the Tax Law provision for taxes upon investments which have not paid "investment" or "secured debt" taxes.

Where bonds were issued under and secured by a mortgage upon real property within and without the State and a tax was paid prior to April 1, 1917, under section 260 of the Tax Law upon the entire amount of the mortgage, such bonds are not subject to taxation under article XV of the Tax Law providing for tax upon investments, nor under section 221-b of the Tax Law providing for additional transfer taxes upon investments which have not paid "investment" or "secured debt" taxes.

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Attorney-General

Hon. Eugene M. Travis, State Comptroller, submitted a statement of facts as follows:

"On October 1, 1909, the New York Telephone Company made a mortgage to trustees upon all its property wherever situated and all after acquired property to secure an issue of not more than \$75,000,000 of bonds. At the time of recording, a mortgage tax of \$250,000 was paid on the basis that \$50,000,000 of bonds had been issued, and later when \$25,000,000 more bonds were issued a further tax of \$125,000 was paid."

Upon this statement of facts the Comptroller has also submitted an inquiry, together with a request for an opinion thereon, as follows:

"Some of these bonds being appraised for taxation under article X of the Tax Law imposing a tax upon inheritance, and no investment tax under article XV of the Tax Law, nor secured debt tax under former article XV of the Tax Law having been paid thereon and no local taxes having been paid thereon during the period they were held by decedent, are these bonds subject to the 5 per cent tax imposed by section 221-b of the Tax Law?"

LEWIS, Attorney-General.—At the time the mortgage was recorded the Tax Commission was urging the owners of mortgages covering property both within and without the State to pay recording taxes, not only upon the proportion of the debt represented by the security within the State but also upon the proportion of the debt represented by the security without the State, upon the theory that such payment would render the bonds entirely free from State and local taxation, except the bank, franchise and inheritance taxes. A question was thereafter raised as to whether the law authorized the collection of the mortgage tax upon the proportion of the debt secured by property without the State and whether such voluntary payment would bring about a valid exemption as to that portion, and in 1916, when section 260 of the Tax Law was revised in many particulars, it was made to carry the provision: "The mortgagor or mortgagee of any mortgage which covers property within and without the State may waive the determination provided for

in this section and pay the tax upon the full amount of such mortgage or of any advancement thereon and thereafter the whole amount of such mortgage or advancement shall be exempt from taxation under the provisions of section two hundred and fifty-one of this article."

In 1917, when article XV of the Tax Law was amended and section 221-b was added to article X, this language was dropped from section 260, evidencing the Legislature's intention to substitute the right to secure exemption by payment under article XV for the right to secure exemption by payment upon that part of a debt secured by property without the State, under section 260. But the Legislature did not intend that where a tax had once been paid upon an investment under section 260, it should again be paid under article XV. That article was amended in 1917, section 338 being made to provide: "If a tax shall have been paid under a secured debt pursuant to former article fifteen of the tax law prior to May first, nineteen hundred and fifteen, or prior to April first, nineteen hundred and seventeen, *under article eleven of this chapter, such debt shall be exempt from taxation hereunder.* * * *"

This indicates that under article XV a security upon which a tax has been paid under article XI before April 1, 1917, is not regarded as an investment for the purpose of taxation, even though it might be an investment within the definition of section 330 to the extent of the ratio of mortgaged properties within the State to those without it.

At the time of the amendment of 1917 to article XV, the Legislature also included a provision in the nature of a penalty for those who did not submit to taxation under it, by adding section 221-b to article X of the Tax Law, providing: "Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-a, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall

have been paid on such investment or secured debt and stamps affixed for a period including the date of the death of the decedent or unless the personal representatives of decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent; * * *."

This was intended to bring about taxation under article XV, and not to apply to securities not taxable under article XV. For some reason, in enumerating exemptions, this section refers to those securities which have paid "secured debt" taxes and "investment" taxes but omits those which have paid taxes under article XI, though the latter are exempted by section 338, which was part of the same legislative act.

If section 221-b had been enacted at a different time from section 338, and had imposed a tax on all investments *as defined in section 330*, with only the exceptions provided for in section 221-b, I should be constrained to hold that payment of a tax under article XI would work no exemption under section 221-b. But it was part of the same act. The Legislature was trying to induce payments under article XV. Article XV specifically exempted bonds which had paid a tax under article XI, before April 1, 1917, and it is clear to me that the Legislature did not intend to tax them under section 221-b.

If section 221-b referred only to the definitions in section 330, it would be clear that the bonds in question were "investments" in so far as they were secured by property without the State, and section 221-b does not carry a specific exemption for investments which paid a tax under article XI. However, section 221-b does not refer to the definition in section 330, but says "an investment, as defined in article XV;" and, as shown above, article XV specifically exempts securities on which taxes were paid prior to April 1, 1917, under article XI. So, such securities, not being taxable by article XV, are not really "investments as defined by article XV."

I conclude that the securities in question are not taxable under section 221-b.

COMPTROLLER

In the Matter of the GENERAL SCOPE OF THE OFFICIAL DUTIES OF THE STATE COMPTROLLER

(Dated July 1, 1918)

Public finances—outline of, as shown by the details of work in the State Comptroller's office.

Authority of State Comptroller and duties devolving upon him, in connection with the several bureaus of corporation tax, investment tax, land tax, mortgage tax and municipal accounts.

TRAVIS, Comptroller.—Despite war emergency appropriations of approximately \$5,000,000 and an increased average cost of nearly 100 per cent due to extraordinary conditions, the State's budget for the year which began July first, has been increased less than \$2,000,000—exactly \$1,782,437.10, or only $2\frac{1}{4}$ per cent more than for 1917-18. Considering the unusual conditions which have been created by the great world wide conflict, affecting as it does not only individuals but every line of business activity, this situation is remarkable.

That the State's budget-makers were able to keep the appropriations to within two per cent of the previous year and at the same time reduce the direct State tax from 1.08 mills to 1.06 mills—a reduction of $\frac{2}{100}$ th of a mill—is extraordinary. To obtain these results, however, it was necessary to scrutinize very carefully all requests for appropriations and eliminate all non-essentials. That this has been done is shown by the splendid results that have been accomplished without affecting in any degree the efficiency and scope of the State's activities.

The Comptroller's plans for financing the budget requirements of \$81,525,271.31 places the probable resources to meet the budget appropriations at \$82,797,258.77, as follows: The available cash balance in the treasury at the beginning of the year July 1, 1918, was estimated at \$11,084,423.20 with probable

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revenues for the year \$58,440,766.57 and a direct tax of 1.06 mills for contributions to the sinking funds and for general purposes amounting to \$13,272,069.

THE CONTINUANCE OF NEW YORK'S DIRECT STATE TAX

We have just passed through another legislative session especially notable for the generous response with which it has met all requests for State moneys to finance the war. Since the declaration of hostilities, over \$17,000,000 of the public money has been made available for war purposes during a period when certain revenues like the transfer (inheritance), stock transfer and excise taxes have been falling off.

This extraordinary condition of the State's finances made it apparent very early in the year that a direct tax with a rate similar to that of the present year was inevitable in order to meet the mandatory charges for sinking funds. At the same time, these war emergency appropriations which were made directly out of the treasury without resorting to special bond issues, as was the case in the last great war, did not require any additional increase in the direct tax.

The decision to levy this tax, however, always leads to a controversy of a partisan character, and although former Governors and State Comptrollers have repeatedly pointed out that this measure is essential to meet such mandatory charges as have been incurred by the direct votes of the people, no substitute has been devised whereby this tax may be avoided. Moreover, such a condition is always exaggerated by the want of thorough understanding by the taxpayer.

And by the taxpayer reference is made particularly to the owners of real and personal property who are usually called upon to contribute the direct State tax, as distinguished from individuals and business organizations who as producers of indirect revenue have for years borne almost entirely the financial burdens of the State. For some years past the taxpayers have observed that the State has been embarking on mammoth and costly public enterprises, such as the Barge canal, forest preserve and highway

improvements, and they have encouraged such measures by their votes. The Legislature has broadened the scope of governmental functions and the taxpayers looked on with complaisance, as the arm of State government spread out for the better production of labor, the improvement of health, the advancement of agriculture and the promotion of education. With them, some of these, perhaps, was a hobby, and in providing for it the Legislature was yielding to their desires.

Prosperity was upon the land and, therefore, why worry about the cost of government, especially while the producer of indirect revenue was footing the bills. But the war emergency appropriations and the fixed charges incurred by the people have already informed the taxpayer that there is a relationship between himself and the State's finances which he should understand.

But no matter what improvement takes place in public finance or how clear the subject may become, taxation will never be popular. History tells us that the feud between tax and taxpayer is as old as civilization. Men will never get over the idea that taxation involves imposition and bunco and that a gold brick comes wrapped up in every tax bill; that even if you do not see it, it is there. Do you remember any particularly pleasant personal impression you ever had on the subject?

We sometimes read of men facing death with a smiling countenance, but did you ever know of any one who looked with a smiling face on his own tax bill? The resentment toward taxation is a heritage of the days when a tax was very largely a robbery of the lowly for the benefit of the great. We have not yet escaped from the influence upon the minds of our ancestors of the acts of princes and lords of feudal times who compelled tribute wholly out of proportion to the means of the people or the rewards which came to them by reason of government.

The people had few rights and little protection; and they paid heavily even for the little. Taxation to-day is, as it was in ancient times, an enforced contribution toward the support of government, but vastly different in methods of application and in the

purposes to which it is devoted. In feudal times it supported lords in their ease. In our day it enables governments to exercise those various functions whose benefits are general and cannot be measured by their effect on the individual.

We no longer pay taxes as subjects, but as citizens mutually interested in our common government, which is a national copartnership. And yet, all men will not voluntarily contribute to the maintenance of this copartnership. There still remains that instinctive protest and, therefore, it has been necessary to develop a complicated machinery to prevent evasion and compel the payment of taxes.

It is hard to pay taxes because you do not seem to get anything tangible in return. For the money which you pay the grocer, the butcher, the coal man, etc., something substantial is delivered at the house. But the return for your tax money is such a mysterious, invisible thing! You leave your money with the city treasurer and he stamps his name and the date of payment on your tax bill and you carry it back home wondering how much you were stung in the transaction. You are so accustomed to the things which the tax money supplies that you just sort of accept them as a part of natural conditions which Providence sends us — like the sunshine, the rain, the grass and the trees — and you never stop to think that it requires money, and lots of it, to keep them coming.

CORPORATION TAX BUREAU

Exactly \$4,923,091.72, representing one-third of \$14,769,275.16 — the total collected under the new 3 per cent corporation income tax — has been distributed among the several counties, State Comptroller Travis announced recently. This amount, according to the Comptroller's records, was collected from manufacturing and mercantile companies, heretofore exempt, and in the aggregate shows the State's greatest single source of income. Of the proportionate share returned to the localities, New York city received over half — exactly \$2,634,342 — without any additional expense, while the State's portion was \$9,846,183.52.

Heretofore this class of corporations have escaped from any State tax. While theoretically assessed for personal property, in actual practice they have been almost wholly exempt through a scheme whereby they filed their certificates of incorporation in smaller rural sections although still conducting their business in the larger communities. The new law remedies this and the State now does the taxing on the basis of earnings, while the localities do not suffer because the State shares one-third of the amount collected. The total distributed to date by counties, follows:

County	Amount
Albany	\$56,792 16
Allegany	4,226 30
Broome	31,633 28
Cattaraugus	49,771 11
Cayuga	18,485 89
Chautauqua	57,901 87
Chemung	18,489 54
Chenango	8,325 27
Clinton	7,889 70
Columbia	12,100 89
Cortland	11,447 47
Delaware	8,026 40
Dutchess	24,117 65
Erie	288,038 80
Essex	23,960 33
Franklin	5,842 36
Fulton	26,277 09
Genesee	12,942 39
Greene	1,639 18
Hamilton	752 85
Herkimer	64,779 36
Jefferson	36,869 47
Lewis	6,134 88
Livingston	7,294 26
Madison	9,777 70
Monroe	358,782 63

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County	Amount
Montgomery	\$42,902 55
Nassau	11,822 26
Niagara	173,897 35
Oneida	120,511 11
Onondaga	134,485 40
Ontario	8,267 47
Orange	32,209 40
Orleans	3,811 53
Oswego	25,538 23
Otsego	3,510 85
Putnam	681 30
Rensselaer	63,612 79
Rockland	9,474 74
St. Lawrence	66,182 59
Saratoga	39,565 22
Schenectady	136,207 57
Schoharie	818 26
Schuyler	5,395 71
Seneca	7,291 73
Steuben	29,115 99
Suffolk	8,360 81
Sullivan	1,553 31
Tioga	2,292 48
Tompkins	14,355 05
Ulster	15,159 74
Warren	11,350 98
Washington	20,154 63
Wayne	9,025 85
Westchester	133,061 99
Wyoming	3,487 99
Yates	2,246 70

Total collected to June 30, 1918. \$14,769,275 16

INVESTMENT TAX BUREAU

Owners and holders of investments and other forms of intangible property, like bonds and notes, secured or unsecured by

mortgages, etc., will be interested in examining the primer on the new investment tax, issued recently by State Comptroller Travis. This pamphlet, according to an announcement made by the Comptroller, contains a series of questions and answers, with the full text of this latest source of indirect revenue, which is a continuation of the old Secured Debt Statute.

"Few taxpayers of the State are aware of this unusual form of taxation," explains Comptroller Travis. "It is in the nature of an exemption tax, for by paying a small fee to the State the owner or holder of such property may escape a larger tax at home. The net result so far has been that the State has secured about \$1,340,000 income in a way which never would have been paid as taxes anywhere else. This is because the local assessors seldom locate this form of wealth; hence, this sort of a device for bringing such property out of its hiding place.

"In other words, by paying a very moderate fee, the owner of bonds and notes may purchase exemption from local taxation. Many investors, however, have failed to take advantage of this new law because they think the local assessors will not discover the existence of such securities. Last year, a new provision was inserted in the Transfer (Inheritance) Tax Law whereby a penalty of 5 per cent is imposed when the transfer of a decedent's estate takes place, unless it can be shown that this wealth was taxed locally as personal property, or that an investment tax upon it was paid to the State. So far, this amendment has acted as a wonderful stimulus and the amount of revenue from this source is constantly increasing."

LAND TAX BUREAU

Never before in recent years has the State's direct tax been more promptly and completely remitted than during the present fiscal year, State Comptroller Travis announces. Less than \$206,000 remains unpaid, and this situation he considers remarkable, as the delinquent amount in 1916 exceeded one and three-quarter million dollars.

The total tax assessed for last year aggregated \$13,058,752.65,

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and to date \$12,114,719.65 has been received from the county treasurers in the several parts of the State. This money was levied on a basis of 1.08 mills and was imposed upon the real and personal property located in the State, which, to date, it is estimated, aggregates over \$13,000,000,000. The local officials are allowed to deduct a fee of 1 per centum for collection, and this cost the State last year over \$130,000.

Included in the remaining difference still unpaid should be added \$607,550 from Erie county, where, under a special law enacted about 1883, the local officials may postpone the remittance of their allotted share until some time in August. Since the beginning of the fiscal year was changed from October to July considerable difficulty has been experienced in the Comptroller's office with a situation of this character.

The levying of the State's direct tax for sinking fund requirements is mandatory under the Constitution, and in voting for the issue of bonds, the people of the State themselves pledged to pay a direct tax each year until these bonds are redeemed. This additional burden is not oppressive when the taxpayer considers the advantages derived from the magnificent public enterprises, such as canals, highways, forest preserves, etc., which are the reasons for an occasional return to this form of taxation. In other words, he has paid less than eleven cents on every \$100 of valuation for the purpose of redeeming the bonds his vote authorized the State to issue in order to pay for these improvements.

MORTGAGE TAX BUREAU

Mortgage tax receipts for the last fiscal year ending June 30 aggregated \$835,306.94, a total of \$217,847.94 being collected since April, State Comptroller Travis announces. This money represents half the amount collected under a law which imposes a recording tax of fifty cents on every \$100 worth of real estate mortgaged. The county clerk collects and pays over the money monthly to the county treasurer who remits quarterly fifty per centum to the State after deducting the expenses of collection.

MUNICIPAL ACCOUNTS BUREAU

The serial bond method for financing municipalities rather than the sinking fund system now in vogue in the State and many local governments is preferred by State Comptroller Travis. This much is apparent from the Comptroller's statement made public wherein he expressed the opinion that while both methods have their benefits, experience and investigations of the State Comptroller's office convinced him that the serial bond method, under certain restrictions, has the advantage.

"I have reached this conclusion," he explained, "because the uncertainties of calculation which have so unfortunately affected the sinking funds of many of our municipalities in the past, are at once eliminated, while the amount required to pay each year can easily be obtained without calculation. Furthermore, the fact that the same administration which incurs a debt must at once begin, within one year, to make provisions for its reimbursement, necessarily and strongly tends towards responsibility and prudence in the contraction of that debt."

The sinking fund method, to the average official who, as a rule, is not an expert in such matters, is too complicated and requires the most careful handling to keep the funds invested so that they will produce the expected increment at the maturity of the debt. Owing to the frequent changes in public officials, a chance for political manipulation of the funds is not so liable to occur if serial bonds are issued.

As to the enormous savings some authorities claim for the serial bond method, there seems to be some doubt when all elements are taken into the calculation. In a comparison of the two methods the advantages seem to be in favor of the sinking fund method for the first sixteen years, after which time the advantage appears to be in favor of the serial bond method. The difference in favor of each method, however, if compound interest to maturity, at the same rate the debt bears, is added, will exactly equal.

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IN the MATTER OF THE GENERAL SCOPE OF THE OFFICIAL
DUTIES OF THE STATE COMPTROLLER

(Dated August 1, 1918)

Public finances—outline of, as shown by the details of work in the State Comptroller's office.

Authority of State Comptroller and duties devolving upon him—sources of income and purposes of expenditures—the several bureaus of audit, banking, canals, finance and highways.

TRAVIS, Comptroller.—What our State government is doing every day in the way of maintaining the prestige of the Empire Commonwealth, protecting life, property and health, is not generally understood by many of us. We are so rich in our resources, so glorious in our achievements, and so busy with our daily tasks that we seldom have an opportunity of knowing how our officials perform those functions which are the very reason for the State's existence. With this in view, an attempt will be made to describe briefly the vastness of this work and the volume and variety of its activities.

It takes a good deal of money every year to run the State and nearly half of the millions expended goes to provide for the retirement of bonds and pay for the interest on them. During the last two decades, the State's funded debt has grown from \$660 to over \$236,000,000. The reason for this is that the people voted for the State to improve its highways and canals, and extend its forest preserve. The State ran in debt for these things and it takes about \$14,000,000 annually to pay for such improvements.

Nowhere in the world has more attention been paid to education than in New York and for no other purpose have our appropriations been more lavish. Last year, expenditures aggregating \$93,000,000 were paid out for education, the State contributing approximately \$10,000,000, apportioned according to attendance and for the maintenance of the ten normal schools for the

training of teachers. The fourteen State hospitals for the insane, containing about 37,000 patients, cost about \$13,000,000 last year and the twenty so-called "charitable" institutions, with an aggregate population of about 10,000, cost over \$4,000,000.

Agriculture is our fundamental industry and in no State are horticultural conditions more firmly established than here where approximately 2,000,000 people are dwelling on our 216,000 farms. During war times the State should give all possible assistance to enable the farmer to meet with success all unfavorable conditions. For this purpose, we have been expending about \$4,000,000 annually. As a further aid to agriculture, a system of improved highways has been adopted, and so far approximately \$100,000,000 has been pledged or expended for construction. In addition to this cost, over \$6,500,000 is required each year for repairing the 7,500 miles of improved roads.

In ordinary times about \$1,000,000 is appropriated annually for the National Guard, but during the past four years this amount soared to about \$18,000,000. The rest of the money that goes to make up the millions expended is paid out in a number of ways, such as supervision of health, insurance, banks, labor and various other things essential for the welfare of the citizens. So much for the cost of maintaining some of the most important branches of State government. More interesting, perhaps, is the way the money is raised to pay for these activities, and most of this comes in a way that the ordinary man never feels.

The largest amount comes from corporations which net annually about \$14,000,000, and it is expected that this amount will soon jump to \$30,000,000 by reason of the new 3 per cent corporation income tax. The tax on inheritances yields the next largest amount—about \$13,000,000 annually. The liquor tax brings in about \$12,000,000 while the next largest sum comes from stock transfer taxes, which last year yielded over \$7,000,000. Two other unusual forms of taxation on mortgages and investments—exemption taxes—last year yielded nearly \$3,000,000.

To do this work, however, a force of over 21,000 employees, at an annual expense of approximately \$23,000,000, is required.

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Most of them are under civil service protection and constitute a permanent machine for carrying on the State's business. Their names seldom get into print, but they are the really vital element in the conduct of affairs. Governors, comptrollers, etc., come and go but the men who not only perform the detail work but formulate and guide the policies of the different administrations stay on year after year and become permanent fixtures, a few remaining over a quarter of a century.

AUDIT BUREAU

The State coffers have been enriched by approximately \$14,000,000 more revenues so far this year than during any preceding one, State Comptroller Travis has announced. The largest amount of this increase, the Comptroller shows, comes from the new 3 per cent corporation income tax which with other corporation taxes has returned more than \$22,000,000. In addition, substantial increases aggregating \$3,891,141.96 have been collected from other sources totalling nearly \$63,000,000.

Comparatively few taxpayers are aware of the existence of two unusual forms of taxation which to date have netted the State over \$2,300,000. These two forms — the mortgage recording and investment taxes — are in the nature of exemption duties, that is, by paying a smaller tax to the State, investors escape a larger one at home. The result is that the State will receive over \$3,000,000 more income in a way that would never be paid as taxes anywhere else.

In theory, local assessors are required to assess property of every form — mortgages, bonds, and indeed all forms of investments. In fact, they seldom locate these various evidences of wealth. Hence, there was devised a sort of decoy to bring this hidden wealth out of its hiding place. By paying a very moderate stamp fee for recording a mortgage within the State, and by doing the same with respect to mortgages outside the State, which are secured by bonds, the owner of such can purchase exemption from local taxation. Of course, many of them never

take advantage of the investment tax because they think that the local assessors are "pretty soft" and will not find them out. .

But many of them, however, are timid and "come across." Lately there has been inserted a new provision under which a heavy penalty can be imposed upon this form of wealth when the transfer or a decedent's estate take place, in other words, when an inheritance tax is imposed. Upon this event, unless it can be shown that such wealth has been taxed locally, as personal property, or that it has paid the investment tax to the State, an additional inheritance tax of 5 per cent is imposed upon such transfer. This penalty has acted as a wonderful stimulus and the revenue from this source is increasing, over \$1,399,381.21 having been collected.

BANKING BUREAU

"Savings banks are the most powerful institutions for aggregating capital that we possess, and thus far have proven to be one of the greatest agencies at work in the civilized world," declared State Comptroller Travis at a luncheon held recently in the Waldorf-Astoria under the auspices of New York State Savings Banks Association holding its twenty-fifth annual convention.

The Comptroller was the guest and principal speaker, and in the course of his remarks pointed out that savings banks were founded not only as an incentive to thrift but also for the purpose of creating wealth by which the State and Nation have been particularly benefited at the present time.

"Savings bank depositors have proven themselves to be among the heroes of the hour," asserted the Comptroller. "With the aid of officials in the financial world, they have added greatly in helping the accumulation of those billions of dollars of capital invested in Liberty Bonds—the indispensable prerequisites in this world-wide struggle for all that we have and hold dear.

"Moreover, savings bank depositors give the surest and most concrete evidence of the industrial virtues. They are frugal,

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prudent and temperate and are acquiring that power which has created and now upholds all civilization. Besides winning a share in that power, they are fortifying themselves against bad luck and disaster and are developing their own characters by self-denial.

"Nowhere else will we find such guarantees of sound judgment, sober reason and moderate temper as are offered by the fact of savings. There is no other guarantee of good citizenship which is so simple and positive, and at the same time so far-reaching as the possession of such savings."

CANAL BUREAU

Approximately \$3,000,000 was paid by New York State last month as its share of the interest on the State's canal funded debt at present aggregating over \$148,000,000, State Comptroller Travis announced. This money, the Comptroller explained, represents the interest for the last six months accruing July first upon these obligations. They were incurred by the vote of the people during the last quarter of a century.

For almost a century, the Bank of Manhattan of New York city has acted as the State's chief fiscal agent for transactions of this character, and twice a year representatives of the State Comptroller's office visit the bank for the purpose of checking off the State's interest obligations upon the various bond issues. These securities are of a registered or coupon form, as the purchaser selects. In the event they are registered, they are convertible into coupon form, but not *vice versa*.

The interest payable on these securities varies, of course, according to the amount and rate. For example: holders of bonds of the denomination of \$1,000, will receive \$21.25 semi-annually with interest at $4\frac{1}{4}$ per cent; \$20 at 4 per cent and \$15 at 3 per cent. The law requires that coupons must be presented, checked and physically destroyed in the presence of the Comptroller's representatives before the interest accruals are paid by the State. Because of the amount and number of these coupons which are

payable twice each year, it is necessary for the State Comptroller's office to arrange for their payment at least fifteen days in advance.

Perhaps the most significant part of this work, as far as the State is concerned, is the method which it has adopted of financing in this way its share of these important enterprises. Before the bond method of payment, similar improvements were paid for directly out of the treasury, but this bond issue scheme has proven to be a device whereby the State has been enabled to spread over a series of years the payments for improvements which will be enjoyed by coming generations, and it is only just that they should be asked to share the burden of this expense.

FINANCE BUREAU

Despite war emergency appropriations of nearly \$5,000,000 and an increased average cost of nearly 100 per cent due to extraordinary conditions, the State's budget for the fiscal year which began July first, has been increased less than \$2,000,000—exactly \$1,782,437.10, or $2\frac{1}{4}$ per cent more than for the past year—State Comptroller Eugene M. Travis has announced. Considering the unusual conditions which have been created by the great world-wide conflict, affecting as it does not only individuals but every line of business activity, the Comptroller believes that this situation is remarkable.

“That the State's budget-makers were able to keep the appropriations to within two per cent of the previous year and at the same time reduce the direct State tax from 1.08 mills to 1.06 mills—a reduction of 2-100ths of a mill—is extraordinary,” he declared. “To obtain these results, however, it was necessary to scrutinize very carefully all requests for appropriations and eliminate all non-essentials. That this has been done is shown by the splendid results that have been accomplished without affecting in any degree the efficiency and scope of the State's activities.”

The Comptroller's plan for financing the budget expenditures places the probable resources to meet the budget appropriations

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at \$82,797,258.77, as follows: The available cash balance in the treasury at the beginning of the year July 1, 1918, was estimated at \$11,084,423.20 with probable revenues for the year \$58,440,766.57 and a direct State tax of 1.06 mills for contributions to the sinking funds and for the general purposes amounting to \$13,272,069.

The appropriations classified according to the general functions of State government, are as follows:

Executive — Executive Department and Mansion — \$119,849.21 or \$17,352.00 less than the last year. *Administrative* — Secretary of State, Comptroller, Treasurer, Attorney-General, Civil Service Board and State Printer, \$2,267,710.12, an increase of \$397,891.38. *Legislative* — \$1,658,387.37, or \$1,070,746.69 less than the last year. (The increase noted above is due to the printing of departmental reports and bulletins which were formerly classified as legislative printing.) *Judicial* — the Courts, etc. — \$2,762,984.16, a decrease of \$606,954.90, due to a reduction of the judgments of the Court of Claims. *Regulative* — Excise, Health, Industrial, Public Service, Tax, and other departments and commissions of a similar character, whose functions are to regulate, including the new departments of Narcotic Drugs and New York and New Jersey Port and Harbor Commission, \$5,111,740.44, an increase of \$279,987.23. *Educational* — the support of common schools, normal schools, colleges and departments, \$10,804,598.60, an increase of \$782,966.88. *Agricultural* — the Agriculture Division, agricultural schools and colleges, the State Fair, Department of Farms and Markets, \$4,204,491.10, or \$1,201,271.85 more than the previous year. *Defensive* — the State's military and naval establishments, \$3,845,493.83, or \$5,317,019.89 less than the appropriations of last year — the extraordinary appropriations of the previous year being necessary to arm and equip the State's troops for war. *Penal* — for the care and supervision of the offenders against the laws of the State — \$2,997,886.35, an increase of \$599,925.64, due principally to the increased cost of maintenance of the institutions. *Curative* — the hospitals for the care and supervision of the State's

insane, \$13,702,393.77, an increase of \$3,244,707.89, caused principally by increased cost of maintenance and necessary repairs and buildings. *Charitable*—the care and supervision of the dependents of the State, \$5,292,725.15, an increase of \$826,712.49. *Protective*—the conservation of the State's natural resources, the protection of State property, monuments, parks, reservations and patriotic edifices, \$2,791,784.50, or \$326,155.71 less than the current year. *Constructive*—the maintenance of State highways, roads, rivers and bridges, \$7,635,863.08, being \$97,856.71 less than the previous year. This includes \$1,000,000 required to repair roads damaged by military traffic during the last winter and to make them available for future similar use. *General*—the payment of taxes due to counties by the State, the Insurance and Banking Departments, and additional compensation of 10 per cent to State employees, and miscellaneous items, \$2,155,314.94, an increase of \$968,871.99 due entirely to increase of 10 per cent in compensation to State employees on account of the war. *Canal*—maintenance, repairs and advances to the Canal Fund for the completion of the canals and terminals, \$2,843,903.58, or \$74,501.90 more than the current year, of which \$635,000 represents advances for construction account. State debt service appropriation for the redemption of the bonded debt amounts to \$13,330,145.11, which is an increase of \$161,685.95.

HIGHWAY BUREAU

Distribution of \$2,041,916.37 as the State's annual contribution for the maintenance and repair of town highways was made this month when State Comptroller Travis will mail to the several county treasurers checks varying in amounts from \$11,000 to \$112,000. Under the law, the State Comptroller apportions these sums upon the basis of the assessed valuation per mile of the highways in each town. If this valuation is less than \$5,000, dollar for dollar is paid.

Otherwise the amount is graduated down to a 50 per cent basis where the valuation of the town is assessed at \$13,000 or

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more per mile. Statements containing the apportionment to the several towns were immediately sent to the county treasurers upon the Comptroller being notified as to the filing of the required surety bonds by the supervisors. The amounts apportioned among the several counties were as follows:

County	Amount
Albany	\$26,439 39
Allegany	43,865 00
Broome	31,644 77
Cattaraugus	40,605 80
Cayuga	34,467 88
Chautauqua	44,462 69
Chemung	18,710 91
Chenango	38,605 40
Clinton	26,947 06
Columbia	29,713 76
Cortland	20,274 00
Delaware	48,010 90
Dutchess	43,658 88
Erie	60,502 48
Essex	28,952 89
Franklin	31,834 32
Fulton	14,280 33
Genesee	24,702 78
Greene	24,445 42
Hamilton	11,560 27
Herkimer	27,845 76
Jefferson	47,541 11
Lewis	35,063 97
Livingston	31,576 90
Madison	32,741 70
Monroe	56,846 30
Montgomery	17,690 00
Nassau	112,646 52
Niagara	26,034 98
Oneida	51,551 03

IN the Matter of the GENERAL SCOPE OF THE OFFICIAL DUTIES
OF THE STATE COMPTROLLER

(Dated September 1, 1918)

Sources of the State's income other than taxation.

Authority of the State Comptroller and duties devolving upon him — among the most important sources of income apart from taxation are gifts from individuals, grants from the Federal government and proceeds from the sale of public lands — income from special and trust funds managed by the State and invested by the Comptroller — outline of the separate trust funds.

TRAVIS, Comptroller.—The greatest practical problem which arises in connection with the management of the State's finances has to do with the raising of the necessary revenue, and in reviewing the various methods, it is interesting to note that a considerable amount is derived from sources other than taxation. To explain, the State Comptroller's office is custodian of certain invested funds which form a permanent source of revenue. These include gifts from individuals, grants from the Federal government and the proceeds from the sale of public lands — all netting the State nearly \$3,000,000 annually.

The largest part of the State's general revenue, of course, is derived from taxes, and the duty of collecting approximately \$75,000,000 each year rests largely with the State Comptroller. There remains, however, a means besides taxation, which may be termed the "other State income," that is, the interest derived from certain special and trust funds managed by the State and invested by the Comptroller. These form established permanent sources of revenue without at any time requiring any additional taxes from the people. The different funds are kept separate and distinct from each other, and accounts are maintained showing the money received and paid out by each. Last year this total aggregated nearly \$5,000,000.

To understand just how these funds originated, however, and

what they represent, is to know a very important part of the State's financial business. To illustrate: Each one of these funds forms a certain portion of money set apart for particular purposes. The "General Fund" is for the expenses of the State; the "Canal Fund" is managed by a separate bureau in the State Comptroller's office for canal construction and maintenance. There exist, also, educational trust funds (the interest of which is used for the benefit of the schools and academies) such as the "Common School Fund," the "United States Deposit Fund" and the "Literature Fund" for libraries and academies.

The practice of establishing separate funds for special purposes was adopted over a century ago. The first, the "General Fund," originally consisted of the proceeds derived from the sale of land, cash and securities acquired from the State debt, Federal Funding Act and ordinary revenues. After 1835 this fund ceased to exist as a separate fund, and since that time the term has been used to designate the receipts applicable to the payment of current expenses.

The "Common School Fund" was established to insure education to indigent children, although now when education is compulsory, this fund is no longer a charity, but a necessity. The origin of the fund was in 500,000 acres of land, the proceeds from which was increased by contribution to enlarge the fund to \$1,000,000 by 1820, and \$4,000,000 before 1890, when the revenue was turned into the "General Fund" and in this way used for schools.

The "Literature Fund" came from the sale of land reserved in every township for "gospels and for schools" and for the promotion of education. Additions were made from lottery grants and canal stock. Payments of the interest were divided among the several academies for educating teachers and the purchase of books. Since 1906, the net income from this fund has been transferred to the general fund although reserved for educational purposes.

The "United States Deposit Fund" came from the surplus revenues distributed among the several States. Considerable

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scandal has been attached to the early mismanagement of this trust. The net revenue is now transferred directly to the general fund to be used for educational purposes, excepting \$25,000 which goes to the "Common School Fund." The value of the revenue from this fund amounted to \$178,338.79.

The "College Land Scrip Fund" was created out of United States land grants. New York's share amounted to 990,000 acres and from the gross receipts was originated the "Cornell Endowment Fund" which was transferred to Cornell University under the laws of 1880. The "Scrip Fund" increased by gifts from Ezra Cornell amounted to \$688,575 in 1895. Since then the proceeds have been transferred to the General Fund, 5 per cent interest being paid to Cornell University. The last two educational funds belonging to this group are the "Free School Fund" discontinued in 1902, and the "Elmira Female College Educational Fund" of \$50,000, kept separate until 1884, when it was transferred to the college.

In addition to these funds, there existed at different times about twenty "trust funds" representing investments from which the State derived additional income. There was the "Mariners' Fund" from a tax formerly imposed upon all persons entering the Port of New York, for the benefit of the alien poor; the "Military Record Fund," originally subscribed for the erection of a Hall of Records; the "Soldiers' Allotment Fund" and the "Trust Fund" for the payment of bounties, the last two disappearing from the State records about ten years after the war. For a number of years the State acted as custodian of three New York city funds, the "Metropolitan Police Fund," the "Board of Health Fund" and the "Fire Department Fund," as well as the "Women's Monument Fund," which was transferred to the Soldiers' Home at Bath in 1898.

There still remain some four or more important funds which net the State thousands of dollars annually. The "Public Administrators Fund," formed from rents from escheated estates, amounted in 1918 to \$304,065.73. The "Twenty Year Court and Trust Funds" netted the State Treasury last year \$67,555.23 and to date amounts to \$574,471. The State Comptroller is

custodian of the "State Hospital Retirement Fund," deducted from the monthly salaries of all hospital employees. At present this money aggregates over \$200,000.

In order to cancel large single forms of indebtedness, it is customary, and in most cases obligatory, to provide a sinking fund to be set apart for the express purpose of paying the interest and reducing the principal of the debt. The State Constitution forbids the use of this fund for any other purpose and in this way prevents the possible embarrassment of a standing debt. One of the first sinking funds, the "Bounty Debt Sinking Fund," was raised by an annual tax following the Civil War, and closed in 1884. When cancelled, a remainder of \$229,113 was left, which was transferred to the "General Fund Debt Sinking Fund." This latter was necessary to repay temporary loans appropriated to meet current expenses, but a constitutional prohibition followed preventing any such repetition.

The "Saratoga Springs State Reservation Fund" arose from serial bond issues of \$1,284,235, the last bond issue maturing in 1925. The "Palisades Interstate Park Sinking Fund" was created in 1910 and increased in 1917 to care for the \$5,000,000 4 per cent bonds due in 1961 and 1967. The annual contribution last year amounted to \$276,531.18. There are at present six highway debt sinking funds, representing \$80,000,000 worth of bonds for which there exists a sinking fund aggregating July thirty-first \$18,285,126.77. There remains \$20,000,000 more of these bonds to be issued.

The twelve canal sinking funds, representing \$148,000,660 worth of bonds, now amount to \$36,585,507.79. Out of the total amount of all State bonds sold for improvement of canals, highways and the acquisition of forest preserve, there remain \$31,800,000 bonds yet to be issued, consisting of \$20,000,000 for highways, \$5,000,000 for forest preserve and \$6,800,000 for Barge canal terminals. There exist two funds maintained by the State Comptroller's office apart from the other treasury funds. The first, known as the "William Vorce Fund," was created under the provisions of the William Vorce will and the Laws of 1902, requiring that it be kept separate. The net income is

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paid to the Commissioner of Education, who expends the same for the benefit of education in Chautauqua county. The other and last fund, the "Canaseraga Creek Fund," was established by the Laws of 1909 and is made up of funded debt and miscellaneous receipts.

FINANCE BUREAU

That the war has so far cost New York State approximately \$30,000,000 increase without resorting to the issuance of any special war bonds, as has been customary in all previous conflicts, is disclosed in State Comptroller Travis' summary of the State finances. The Comptroller's statement for the last fiscal year ending June thirtieth also reveals an increase of \$14,441,520.46 in receipts over 1916, with a corresponding net gain of \$2,642,508.16 above all expenditures. It is also gratifying to learn that a cash balance exists of \$9,890,616.48, as against \$7,248,108.32 for last year.

In comparing the total expenditures which show an increase of \$12,511,825.50 over the previous year, the Comptroller's report calls attention to the appropriations made for military purposes, including the \$4,000,000 additional required to take care of the State employees who have entered the military service. He also points out an increase of \$1,000,000 required for the new 10 per cent salary allowance for civil service employees, and a special maintenance appropriation of \$2,143,294.45 to equip the new Barge canal for Federal service. In addition to these the Comptroller shows how the increased cost of all commodities used by State institutions and departments and an increase of \$3,500,000 for educational and \$3,200,000 for intensive agricultural purposes has been made.

"The unusual conditions occasioned by the present world-wide conflict," the report reads, "have been met by the present administration in a fearless manner and the people of the State may well be proud of the results that have been achieved in placing at the disposal of the Federal government the most complete and efficiently organized military units the country has yet produced. To equip and maintain the State's contribution to the cause of war has cost millions of dollars, but no patriotic citizen of the

great Empire State will for a moment question the right and justice of these expenditures."

MORTGAGE TAX BUREAU

Mortgage tax receipts for the last fiscal year ending June thirtieth aggregated \$835,306.94, a total of \$217,847.94 being collected since April, State Comptroller Travis has announced. This money represents half the amount collected under a law which imposes a recording tax of fifty cents on every \$100 worth of real estate mortgaged. The county clerk collects and pays over the money monthly to the county treasurer who remits quarterly 50 per centum to the State after deducting the expense of collection. The amounts paid over as the State's share by the various counties are as follows:

County	Amount
Albany	\$14,921 50
Allegany	2,267 91
Broome	9,777 63
Cattaraugus	4,390 60
Cayuga	5,525 14
Chautauqua	6,594 63
Chemung	4,321 43
Chenango	2,202 63
Clinton	2,810 88
Columbia	1,287 14
Cortland	1,577 60
Delaware	2,360 40
Dutchess	4,331 14
Erie	84,554 55
Essex	2,617 11
Franklin	4,108 92
Fulton	1,727 36
Genesee	3,303 74
Greene	848 04
Hamilton	856 28
Herkimer	5,487 44
Jefferson	4,782 40
Lewis	1,230 23

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County	Amount
Livingston	\$2,570 21
Madison	1,648 90
Monroe	26,680 79
Montgomery	1,553 04
Nassau	27,242 03
New York city	429,995 31
Niagara	18,484 17
Oneida	15,069 93
Onondaga	22,095 54
Ontario	4,535 37
Orange	9,145 77
Orleans	2,166 60
Oswego	3,510 93
Otsego	3,771 98
Putnam	688 76
Rensselaer	3,598 07
Rockland	2,954 51
St. Lawrence	4,071 15
Saratoga	4,229 38
Schenectady	7,554 04
Schoharie	2,310 34
Schuyler	612 83
Seneca	1,926 39
Steuben	3,470 00
Suffolk	9,300 06
Sullivan	2,686 85
Tioga	1,048 91
Tompkins	1,668 65
Ulster	3,412 59
Warren	1,735 23
Washington	3,446 05
Wayne	6,408 89
Westchester	31,073 09
Wyoming	1,819 05
Yates	926 83
Total	<u>\$835,306 94</u>

CORPORATION BUREAU

Approximately 1,100 delinquent corporations, which to date have failed to pay to the State a tax of 3 per cent based on the net income from their earnings last year, are facing court proceedings, State Comptroller Travis has announced. According to the office records, about this number of manufacturing and mercantile corporations doing all or part of their business in the State have, since February first, been rendering themselves liable to penalties when they became subject to a fine of 10 per cent in addition to the amount of the tax, with 1 per cent added after each month's delay.

In some instances these business concerns have raised questions of law in their answers, but there are still a number who so far have failed to acknowledge the repeated demands made upon them. Under the old Corporation Tax Law this class of corporations was exempt from any State tax and the majority of them escaped the assessment locally through a scheme whereby they filed their certificates of incorporation in the smaller rural sections of the State, although still conducting their business in New York city and in the larger centers of population. In this way the local assessors were unable to discover the existence of these corporations because their principal place of business was usually located elsewhere.

The new statute was enacted last year and during the last session of the Legislature four important amendments were added. Under the present act two-thirds of the tax of 3 per cent imposed on the net earnings of all manufacturing and mercantile corporations goes to the State, and the remaining third is distributed to the localities—counties, cities, towns and villages. If the business returns no income, a minimum tax of \$10 is levied. The apportionment of this tax among these places is made in accordance with the amount of tangible personal property in the locality. To date approximately \$15,000,000 has been collected, but it is expected that at least \$20,000,000 will have been received before the end of the year.

IN the Matter of the GENERAL SCOPE of the OFFICIAL DUTIES of
THE STATE COMPTROLLER

(Dated November 1, 1918)

Necessary increase in the cost of carrying on the State government.

The amount necessary for the retirement of bonds and to pay interest on them — administration of State institutions for the insane and for criminals — highway expenditures and cost of the maintenance of the National Guard — conservation of the forest, fish and game development — sources from which the funds for meeting these expenditures come — revenue derived from the canal bureau and the financial bureau.

TRAVIS, Comptroller.— The important facts regarding the internal affairs of State these days are unknown to many New Yorkers because we are so busy earning a living and devoting our attention to the prosecution of the war. Nevertheless, the vastness of the work of State government and the volume and variety of its activities are matters of vital concern to every inhabitant of this State, whose motto "Excelsior" is exemplified in every phase of its being.

It takes a lot of money to run State government — over \$81,000,000 this year — and it will take more as time goes on. The party out of power will always tell us that the party in power is responsible for this increase; that it expends more than is necessary and that too much is wasted. But the charge is always of a partisan nature, ever revived during election times and afterwards immediately subsides.

One of the heaviest requirements is for debt service, that is, the amount annually needed to provide for the retirement of bonds and pay the interest on them. By direction of a majority of our voters we built the new Barge canal — the largest single public enterprise — at a cost of over \$150,000,000, and during the last few years over \$100,000,000 highway bonds and \$25,000,000 forest preserve bonds have been issued.

By vote of the people, the State ran in debt for these projects and it costs about \$14,000,000 annually to provide for the payment of these undertakings. The State is the real protector of our educational system, and while taxes are paid locally for such

purposes, the State also makes contribution — \$12,000,000 out of the \$96,000,000 appropriated — and it supervises the whole system, maintaining ten normal schools for the training of teachers.

The Commonwealth manages also about fourteen hospitals for the insane and they contain about 40,000 patients at an annual cost of approximately \$14,000,000. Moreover, the State conducts something like twenty charitable institutions for the care of children who are feeble-minded, blind, crippled or in need of moral training, and for the care of tubercular persons, old soldiers and their widows. The aggregate population of these institutions is about 10,000 and the cost of maintaining them is about \$6,500,000 annually.

The six prisons of the State contain about 5,000 inmates and the cost of conducting these institutions is approximately \$3,000,000 each year. For the promotion of agriculture in all its forms, including the scientific training of young men at agricultural colleges, stamping out all sorts of insect pests, diseases among cattle, etc., the State annually spends about \$5,000,000.

As above indicated, the State goes into debt for the building of highways, but annually pays its proportionate share by contributing to sinking funds which are reserves made for the specific purpose of paying off the interest and reducing the amount of the principal. In addition to the cost of construction about \$4,000,000 is required annually for maintenance and repair, or an average of about \$655 per year to maintain one mile of road.

In ordinary times the National Guard costs about \$1,000,000 a year, but during the last three years, approximately \$18,000,000 was made available. The rest of the money that goes to make up the millions appropriated for State government is expended in such a variety of ways that it would become monotonous to attempt figures. They include, however, general administration, supervision of banking, labor, insurance and other activities essential to the welfare of the citizens.

There is one phase of governmental activity that is especially interesting at this time, the conservation of the forest and the

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development of the fish and game. The State owns about 1,700,000 acres of forest land and it takes a small army of men to patrol these and to enforce the game law. And yet the entire payroll amounting to \$225,000 annually is paid out entirely from hunting license receipts.

So much in a general way as to how much money it takes to run each of the important branches of the State government. Even more interesting is the manner in which the money is raised to meet these requirements. Few people remember that for years — ever since 1904 — the State has been run almost entirely without direct taxation, that is, without a tax on assessed valuation of real estate in the manner that city and county taxes are paid. Since the annual payments created by the canal, forest preserve and highway debts have increased so largely for interest and retirement of the bonds issued for these enterprises, it has become necessary to resort again this year to a direct tax.

But even now only about 15 per cent of the total amount raised is realized in this way. How, then, does the State get its money? Well, it comes from all manner of special taxation which the ordinary man never feels. The largest source of income is from corporations, which in recent years has netted about \$14,000,000 annually, but which this year so far has aggregated \$27,000,000.

The tax on inheritances yields about \$14,000,000, and experts declare it to be the most scientific ever devised. During the last three years approximately \$12,000,000 was secured from the estates of four multimillionaires. One of the most productive and least costly of the so-called "indirect" sources of revenue has to do with the tax on stock transfers, which since its enactment in 1905 has produced over \$60,000,000.

The tax on the liquor business now nets about \$12,000,000 annually and although the number of licenses issued has been reduced from 25,000 to 20,000 this year, the revenue from this source will not be reduced because of the so-called "volume" tax, that is the tax imposed upon the consumption of liquor over and above a specific amount, when an additional revenue of from 2 to 5 per cent is collected. There are two forms of State taxes

which are in the nature of exemption taxes, that is, by paying a certain amount of tax to the State it is possible to avoid the payment of a larger tax at home. As a matter of fact, however, the net result is that the State gets about \$2,500,000 income in this way which never would be paid as taxes anywhere else. These two unusual forms of taxation are the mortgage recording and the investment taxes which last year netted the State about \$3,000,000.

The State's share of the tax on motor vehicles last year aggregated \$2,400,000. This amount represents half the sum collected, the remaining portion going to the communities. So far this year over \$2,000,000 has been collected, and under the law all the money is set aside for highway maintenance, either by the State directly or by the various counties.

Another source of considerable income is the organization tax on corporations, which so far this year has netted over \$1,100,000. Moneys of the State deposited with the banks earn an interest of about \$500,000 annually. The State makes examinations of banks and insurance companies for the protection of depositors and policy-holders, and such institutions must reimburse the State for the expense, which last year totaled about \$1,500,000.

Whenever they are able to do so, relatives of persons confined in State institutions must pay the State something for their care, and this yields about \$750,000 annually. Last year automobile owners paid to the State \$40,000 for violations of the motor vehicle law. In addition to the revenues enumerated, there is supplemented an income from various other fines, fees and earnings, and so far this year approximately \$6,000,000 has been received from such miscellaneous receipts.

Naturally it takes a considerable force of employees to carry on this vast amount of work. The State has 21,000 employees and the annual payroll amounts to approximately \$18,000,000. Most of these are under civil service protection and constitute a permanent machine for carrying on the State's business. Their names seldom get into print but they are the really vital element in the conduct of affairs, and some of them have been so employed for years.

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In the above paragraphs, some of the most important things about this great Empire State have been described at length. During the last few years, however, legislation has been enacted which has revolutionized the conduct of State government. One of the most important constructive legislative measures ever introduced has to do with the installation by the State Comptroller of a systematic plan of central purchasing of department supplies, enabling the State to save millions of dollars annually.

Another example of administrative efficiency is shown through the effective organization known as the State Troopers, and so far this institution has firmly established itself as an important factor in the police protective service of the State. So much for some activities of importance about this great Commonwealth, but the real glory of the present hour is its loyalty that has never failed when the Nation has met a crisis. In the present world-wide conflict 500,000 men and \$18,000,000 have been contributed.

CANAL BUREAU

The canal revenues derived from tolls up to 1882 when discontinued, netted the State nearly \$100,000,000 profit above all expenditures, Comptroller Travis announced recently. This statement, made upon examination of the Canal Bureau records in his department, is significant, in view of the government's proposal to restore toll charges as it discloses an earning of \$135,418,324, or a net profit of \$87,019,038.11 over all operating charges, collected between 1825 and 1882.

"The movement abolishing tolls," explained the Comptroller, "started when foreign markets determined the price of grain and lower transportation charges meant a benefit to the commerce of the entire world. For years attempts had been made to secure free tolls, the conviction prevailing that the State's prosperity was due to the canals rather than the revenue they produced."

"The controlling factor, however, was that low railroad rates made the canal operations unprofitable despite the fact that the canal rate was the lowest on record. The climax was reached when the aggregate revenue returns fell 20 per cent below actual maintenance cost, and had this continued, the canals would have

had to cease operation for want of authority to provide funds for maintenance."

"The remedy suggested was (1) to relieve revenues from contributing to payment of debt, or (2) to abolish tolls and pay for maintenance by taxes. The latter method was adopted by a constitutional amendment and from that time the canals have been a source of expenditure rather than revenue."

FINANCIAL BUREAU

Opposition to the proposed Federal tax upon State and municipal bonds was expressed by State Comptroller Travis in a statement in which he points out that such a levy would be in direct violation of the contract by which these purchasers were guaranteed tax exemption of all kinds. In the event that this levy is required for the period of the war, however, Mr. Travis believes it would be the plain duty of the State and municipal governments to pay this on outstanding bonds and reimburse themselves by a general property tax, which would mean that the already overburdened real property of the State, now paying 96 per cent of the taxes, would have to bear this additional burden.

The Comptroller said in part: "The proposal to impose a Federal income tax upon State and municipal bonds so vitally and detrimentally affects the finances of political subdivisions over which the Comptroller is required by law to exercise supervision that I feel warranted in expressing opposition to the proposal. While the conditions of the present time are different than any one could have foreseen some years ago and the successful prosecution of the war requires taxation in forms none of us dreamed of (but which we concur in for obvious reasons of patriotism), the proposed tax on income from public bonds places State, county, city, town, village and school district governments in a most embarrassing position and, if imposed, may seriously affect their credit for years to come. No motive except that of sound public policy could impel me to enter a protest against any means the Federal government may see fit to employ to provide the sinews of war; but in this instance the revenue which would be obtained could not compensate for the loss of financial prestige

which the various governments I have mentioned would suffer. In a very large degree the honor of the States is involved, for they gave their word that all these bonds would be free of tax."

"In New York State alone there are outstanding hundreds of millions of bonds of this character. The State itself has out approximately \$250,000,000 and to this must be added the enormous indebtedness of New York city and of the other cities and subdivisions, all of which have issued their bonds since 1909 with a clause covenanting that they shall be exempt from taxation. This covenant was made in good faith. The Legislature authorized it for the purpose of creating a better market for public bonds and keeping down the interest rate. It was not assumed that the Federal government would interfere with this agreement, because its historic policy has been not to interfere with the taxing powers of the States, and indeed, the interpretation which the highest courts in the land had put upon the Constitution was that the Federal government could not interfere. Good lawyers now contend that to tax the income upon these bonds will be an unconstitutional provision and cannot be enforced, but I am not a lawyer and will not discuss that phase of the question, confiding myself to its moral and business side."

"The greater part of these public securities are held in a fiduciary capacity by trust and insurance companies, savings banks and estates for the benefit of widows, orphans and other dependents. The income upon funds of this character is founded upon investments yielding a rate of return based upon the purchase price. If the proposed tax were deducted from such incomes, it would cause hardship to those who, through lack of earning capacity could not overcome the loss of income which this tax would entail. In the case of savings banks and trust companies whose securities have been already considerably depreciated by war-time conditions, it would cause still further depression in values. But the worst effect would be upon the State itself. For all time to come it would be under the stigma of not being able to protect its written promise. The war and its financial difficulties will pass and some day normal conditions will return but never again could New York or any State expect

the investor to accept its guarantee of tax exemption, because a higher power could set aside the guarantee. The only way in which the State and the municipality can keep this promise, if the tax is imposed, is to reimburse the bondholders out of the public treasury for any tax that may be imposed upon these public securities. No matter how extraordinary such a step would be from a business standpoint, no one can question its moral soundness."

"Perhaps some one will say: 'Conceding that it is improper to impose this tax on outstanding public bonds, why should future issues be tax exempt?' I believe there is an adequate answer to this. Remember, I am speaking in all this argument from the standpoint of the public as represented by its government, and not from the standpoint of the investor or holder of the bonds. In the first instance, it is the good repute of the State that would suffer; in the second instance, the sufferer would be the public pocketbook. If Congress decides to impose this tax, the effect will be to raise the interest rate on future issues. That is, the public would be required to pay more for the money it borrows from investors. These bonds usually run a long time before maturing. In the meantime, the necessity for the Federal tax may disappear, whereupon the investors' income from these public bonds will increase and the securities grow in value. That will be putting public money in the investors' pockets. It cannot be successfully argued that such a result would affect the investors' loss upon their earlier purchases, because the issues of the future would probably be in different hands than those now outstanding."

"There is further argument that may be brought in here and it is that if Congress has the right to tax future issues of bonds, then it has the right to tax past issues, and in the near future, Congress could take advantage of this privilege. On the whole, the proposition threatens so much of legal and other complications apart from its embarrassment to the governments which issued the bonds, that the Federal authorities ought to obtain from some other source the little revenue which these bonds would yield and assist in protecting the good name of the States and their various subdivisions."

STATE CONSERVATION COMMISSION

In the Matter of MEASURES FOR DIMINISHING POLLUTION IN THE WATER COURSES OF THE STATE

(Dated September 5, 1918)

Increase in the production of food fishes largely dependent upon the elimination of pollution in the water courses of the State.

The upbuilding of fish culture and of the health of the public bears a close relation to the clearing up and freeing from pollution of the water courses throughout the State. A conference in line with efforts in this direction has just been held by representatives of the State Board of Health, the United States Food Administration, biologists and fish culturists and representatives of industries and public organizations from every part of the State. Such conference has resulted in allowing the Conservation Commission to map out a plan to immediately abate many of the severest cases of pollution and bring about the gradual and progressive cleaning up, through a period of years, of the State water courses.

BY THE COMMISSION.—Cleaning up the water courses in New York State in the interest of fish life and public health is to be started immediately by the Conservation Commission, in accordance with a definite program agreed upon at a conference in the office of the Commission, attended by representatives of the State Board of Health, the United States Food Administration, biologists and fish culturists and representatives of industries and public organizations from all parts of the State.

The conference, which was called by Conservation Commissioner George D. Pratt, followed a preliminary survey, carried on throughout the last two months, of the extent and evils of pollution in New York State, and a careful study of steps that must be taken to abate it, with due regard for the State's highly organized industrial fabric. This survey and study, which has been made by Prof. Henry Baldwin Ward, of the University of Illinois, a biologist of international reputation, and an expert of long standing on pollution subjects, formed the basis of dis-

cussion at the conference, and brought about the complete agreement of those present.

The relation of pollution to the war and food supply was emphasized by Mr. W. S. Downs, Assistant to the Chief of the Division of Fisheries of the United States Food Administration, who stated that among all of the suggestions received by the Food Administration for the increase of food fishes over the entire country, and particularly in the States bordering on the Atlantic and Pacific seaboard, more than 60 per cent gave the elimination of pollution as the most important factor in the problem. Mr. Downs stated that the support of the Food Administration would be squarely behind the program of the Conservation Commission to clean up the State's water courses. He re-enforced his statements with definite instances drawn from his long experience in the commercial fisheries of the Hudson river, and the Long Island coast, to show that pollution has exercised a direct and powerful influence in gradual elimination of fish from these waters, and has now reached the point where, in many places, it threatens their practical extinction.

That pollution has been rapidly on the increase in New York State, and that the time has now come when the tide should be set definitely in the other direction was agreed by all present.

The program agreed upon by the conference requires few changes in the present law. Appropriations will be necessary, however, for the employment of an expert biologist and chemist, for educational work among industries affected, and for general administration of laws already on the books. The program further provides for the establishment in the Conservation Commission of an effective clearing house regarding all pollution matters, and for developing co-operation among the industries concerned, so that reclamation and disposal processes worked out by industrial chemists and engineers may become generally known. It was the belief of the industries represented at the conference that a spirit of co-operation will be manifested by manufacturers, and that in the majority of cases it will not be necessary to apply the rigorous procedure now provided for the enforcement of the law.

It was suggested by O. E. Merrell, vice-president of the Merrell-Soule Company, who operate large canning factories, and by Dr. Charles E. Cummings, chemist of the Eastern Tanners Glue Company, and indorsed by the conference, that from time to time special conferences of individual industries be held for the development of co-operation in cleaning up pollution industry by industry.

The great problem of the pollution of the lower Hudson river, particularly by wastes from New York city, was presented by Col. John Y. Culyer, of the pollution and sewerage committee of the Merchants' Association of New York City, who brought out the fact that this problem is receiving constant attention by that organization, and by sanitary engineers, who are making its solution one of their chief endeavors.

The conference was adjourned with a statement by Commissioner Pratt that the investigations of the last two months, and the present conference, have made it possible for the State to abandon its quiescent policy regarding this growing evil, and have resulted in the mapping out of a plan under which it will be possible to immediately abate many of the severest cases and bring about the gradual and progressive cleaning up, through a period of years, of the water courses of the State.

**IN THE MATTER OF THE OFFER OF LAND FOR AN ARMY HOSPITAL
UPON THE STATE RESERVATION AT SARATOGA SPRINGS Made
by the Commission to the National Government**

(Dated October 1, 1918)

Sick and wounded soldiers — use and benefit of the State waters at Saratoga Springs offered to National Government.

The State Conservation Commission has tendered to the National Government free of charge lands sufficient for an army hospital upon the State Reservation at Saratoga Springs, together with the right to use the carbonated and medicinal waters of the springs upon the reservation for bathing purposes, the medicinal waters that have to be bottled for drinking to be supplied at actual cost to the State.

BY THE COMMISSION.—Land for an army hospital upon the State Reservation at Saratoga Springs, and the use of the carbonated and medicinal waters of the reservation for bathing purposes, have been offered to the National Government free of charge by Conservation Commissioner George D. Pratt. Medicinal waters that have to be bottled for drinking will be supplied at actual cost.

Commenting on the offer, Commissioner Pratt said that his purpose was to make the tonic and healing resources of the State Reservation as helpful to sick and wounded soldiers, many of whom will be New York boys, as are those of the great Spas of Europe to the armies over there.

The offer is contained in a letter to Surgeon-General W. C. Gorgas, and states that "the purpose of the State of New York in acquiring the property constituting the State Reservation at Saratoga Springs was to save the medicinal resources of the springs for the general public. It is felt by the Conservation Commission that no better use of these resources can be made at the present time than to place them at the disposal of the National Government, and this offer is accordingly made in the full spirit of the Conservation Law which established the Reservation."

Commissioner Pratt's letter contains five concrete offers, the first of which is sixty acres of land for army hospital purposes during the period of the war, and for a necessary period thereafter, without charge. This land is situated in a most advantageous position for the purpose and adjoins eighty-four acres of privately owned land which the Commission believes can be secured if necessary.

The Commission offers further to deliver to the plumbing system of an army hospital water for carbonated mineral baths up to a maximum of 150,000 gallons per day, free of cost to the government. This mineralized and carbonated water can be delivered into the tubs with a super-saturation of carbon dioxide gas greater than that available at any other health resort in the world.

The third point in the Commission's offer is to supply the army hospital with the bottled medicinal waters of the State Reservation for drinking purposes at actual cost. These waters include cathartics, diuretics, chalybeates, and alkaline digestants, all of which are effective in treating many forms of incapacity caused by the war.

The Commission offers further, in the event of a hospital being established in any of the large existing Saratoga hotels, to deliver water for bathing purposes to the plumbing system of such hospitals without charge and to supply bottled waters at cost.

The Commission also offers, if it is desired to treat a limited number of cases for a short time, in order to ascertain the special adaptability of the Saratoga waters to the treatment of certain classes of wounded and incapacitated soldiers, to place the facilities of one of the State bath houses at the disposal of the government without charge and to supply bottled waters at cost.

Commissioner Pratt states in his letter that a long clinical experience has proved the Saratoga waters valuable in a wide range of diseases. Because of the tonic effect of the mineral water baths in post-operative cases, he believes that they will be of marked assistance in the recovery of certain classes of wounded cases. He also believes that the treatments for nervous diseases, which have long been given with marked success, will be effective in many shell-shock cases.

The subject has already been informally discussed by the Commission with army medical officers, and it is believed that if the offer of the Conservation Commissioner is accepted, it will mean the establishment upon the State Reservation of an army hospital capable of treating 10,000 selected cases at one time.

In the Matter of the INCREASED PRODUCTION OF FIREWOOD
to Meet the Coal Shortage of the Coming Winter

(Dated October 1, 1918)

Meeting the coal shortage by means of increased production of wood.

Various State Departments, Farm Bureau men, Foresters and Grange representatives, through the Conservation Commission, have formulated plans for interesting the owners of woodlands throughout the State in the increased production of wood, in order to release for the making of munitions the largest possible quantity of coal. The methods of co-operation now in use outlined.

BY THE COMMISSION.—Increased production of wood to meet the coal shortage of next winter will be started immediately throughout the State, in accordance with plans formulated at a meeting of State Departments, Farm Bureau men, Foresters and Grange representatives, just held at the office of the Conservation Commission. The work is a continuation of that begun by a committee appointed by Governor Whitman last winter at the first indication of the fuel crisis.

At the conference just held, it was the decision of the committee, who are in touch with the national fuel situation, that the warning issued by the committee last spring, that supplies of coal for the coming winter will be entirely inadequate, must be further driven home to those in position to obtain or supply wood, before the snows of mid-winter make it too late. The need for coal to make munitions makes it of the utmost importance that every possible cord of wood be cut and used this winter.

The plans of the committee provide for cooperation with county fuel administrators, granges and farm bureaus in stimulating wood production. They include also the organization of wood exchanges and municipal wood yards in places where they can do effective work. Exchanges and wood yards have already been established in several communities.

The plans also provide for an intensive campaign of education

in the rural districts and small towns, by means of motion picture films, posters, and other methods of publicity. It is felt by the committee that a hope that coal will be available in the middle of the winter is unfounded, and is leading to a fatal procrastination on the part of possible wood cutters and users. This procrastination, the committee agreed, will result in severe privation when the available coal is exhausted, because of the difficulty of cutting, seasoning and delivering wood on short notice. The committee proposes to have this situation clearly understood in every part of the State so that all persons who can secure wood and do not do so will be themselves responsible.

Those present at the conference included Conservation Commissioner George D. Pratt, Member of the United States Fuel Administration; W. G. Howard, Director of the Wood Fuel Bureau of the Conservation Commission; Commissioner of Agriculture Charles S. Wilson; M. C. Burritt, Director of State Farm Bureaus; Professor Ralph S. Hosmer, Director of the College of Forestry at Cornell University; Dean F. F. Moon of the College of Forestry at Syracuse University; Professor A. B. Recknagle, Forester and Secretary of the Empire State Forest Products Association; Austin F. Hawes, representing the United States Forest Service; Professor G. H. Collingwood of the College of Forestry at Cornell; and Mr. G. Y. Lansing, representing County Fuel Administrators.

In line with the established policy of securing the increased output of wood as outlined in the above matter the Commission has just issued a poster in conjunction with the United States Fuel Administration, to be put forth throughout the country districts and small towns of the State under the suggestion "Cut Wood — Burn Wood." "Every stick burned saves coal to send munitions over there" is the explanation given on the poster for the slogan.

The poster is in the form of companion pictures, one showing a husky, old time chopper felling a tree, while his companion cords up the wood, and the other depicting a kitchen, with the housewife, the range and the full wood box. Behind the wood box is a

soldier's picture with a service flag draped from it. Binding the two companion pictures together is a long decorative panel across the bottom, with the Statue of Liberty on one side and a long line of steamships with smoke pouring from their funnels, ploughing across to the other side, where belching artillery is massed on the battle field.

Twenty-five thousand copies of the poster have been issued as part of the campaign which a committee, composed of the Conservation Commission and representatives of the Grange, Farm Bureaus and Colleges of Forestry, have conducted for nearly a year in cooperation with the National Administration. This committee, which has been working since the beginning of the fuel crisis last winter, intends to bring clearly home to everyone in small towns and rural districts the urgent necessity of providing wood before the coal scarcity of the coming winter is upon them and the deep snow makes it impossible to obtain relief.

The poster is from a drawing by Belmore Brown, explorer and artist, and now a captain in the Spruce Production Division of the Aviation Service.

**In the Matter of REPLANTING BLACK WALNUT TREES NOW
Threatened with Extermination as a Result of Their Use for
War Purposes**

(Dated October 12, 1918)

The existing rarity of American black walnut largely due to the activity of German agents twenty years ago in stripping our black walnut belt.

The representatives of Germany two decades ago bought up and transported to Germany for military purposes numberless shiploads of American walnut, with the result of almost stripping this country of these trees. When the present war began and gun stocks and airplane propellers were needed it was found that black walnut trees, out of which these war materials were made, were very scarce and efforts are now being made to replace by planting the great number of trees stripped from the American belt.

By THE COMMISSION.—Replanting of black walnut trees, which are threatened with extermination, as a result of their use

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for war purposes, is urged by Conservation Commissioner George D. Pratt, in a general order sent out to all game protectors and forest rangers in the State, instructing them to locate such black walnuts as still remain in their territory and to gather and plant as many nuts as possible. Commissioner Pratt is working in co-operation with James E. West, executive secretary of the Boy Scouts of America, William T. Hornaday, director of the New York Zoological Park, and John M. Phillips, Fish and Game Commissioner of Pennsylvania, in a nation wide movement for the re-establishment of this valuable tree.

According to the United States Forest Service the shortage of black walnut trees is not due alone to the demands of our own army, the Germans themselves having stripped the American black walnut belt twenty years ago, when shipload after shipload of walnut lumber collected by German agents were transported to Germany for military purposes. Their forehandedness in acquiring large stocks of black walnut timber this way undoubtedly means that they are now using American black walnut against American troops.

When the plants working on government orders found that the country had been almost clean-cut of its black walnut, and that there were no large known tracts of it left, President Wilson called upon the Boy Scouts to seek out individual trees for use in the manufacture of airplane propellers and gun stocks. The Forest Service, in giving the total of the figures as submitted to the Ordnance Department, says that the Scouts have reported 14,038,560 board feet, or about 3,667 car loads of black walnut.

Commissioner Pratt, who is himself treasurer of the Boy Scouts of America, believes that the trees should be replaced, not only by the Scouts, but also by everyone who may have opportunity to secure walnuts for planting purposes.

Wm. T. Hornaday, who has made a special study of the situation, says the planting of the trees, which should be done in October and November, is a very easy process. The nuts should be planted in good soil with the hulls on them, lying sidewise, and the depth should be about four inches. The black walnut is a

beautiful tree which grows rapidly, and produces nuts in five years. Future governments will need the black walnut lumber for airplane propellers and gun stocks, because it does not warp and does not splinter when hit by bullet or shrapnel. Future furniture makers will need it for furniture on account of its rich brown color and easy working qualities, and the value of the nuts as food is not to be overlooked.

Commissioner Phillips of Pennsylvania, in emphasizing the genuine patriotic service rendered by the gathering and proper planting of walnuts, writes: "We are gladly assisting the French to rebuild their towns and plant trees to replace those destroyed by the Hun, and I think we should do a little work for ourselves along the same lines, as the Hun is directly responsible for the threatened disappearance of our walnut trees."

IN the Matter of **EXTENDING THE FOREST PRESERVE OF THE STATE** under the Bond Issue Approved by the Voters of the State for Acquiring Lands for State Park Purposes

(Dated October 21, 1918)

Acreage now being negotiated for by the Conservation Commission for addition to the forest lands of the State.

In the purchase of 200,000 acres of land now being negotiated with the owners in addition to the present State parks now owned by the State the people of the State have a magnificent extent of forests. A bond issue of \$7,500,000 voted by the people for the acquisition of lands in the Adirondacks and Catskills for State park purposes resulted in the offer for sale by the owners of 460,731 acres. After deducting the tracts which were unsuitable for forest purposes the acreage examined and appraised by the Commission is an area almost one-fourth the size of the entire forest preserve owned by the State prior to the bond issue. The land accepted under the said bond issue up to this time is 156,398 acres, of which 135,398 acres are in the Adirondacks and 21,000 in the Catskills. The average price paid was \$5.79 per acre in the Adirondacks and \$7.10 in the Catskills, the whole sum expended amounting to over \$900,000. Advantages to the State of securing the ownership of those forest lands.

BY THE COMMISSION.—A forest preserve of over 2,000,000 acres is assured to the people of the State of New York, and the

purchase of more than 200,000 additional acres is now being negotiated with the owners, according to a summary just compiled by Conservation Commissioner George D. Pratt. The summary represents what has been accomplished by the Conservation Commission in the eighteen months since funds became available under the \$7,500,000 bond issue which the voters of the State approved for the acquisition of lands in the Adirondacks and Catskills for State park purposes.

The figures show that, since the approval of the bond issue, 460,731 acres of forest land have been offered for sale to the State, of which, after deducting such tracts as by their location were manifestly unsuitable for forest preserve purposes, 411,650 acres have already been examined and appraised by the Commission's foresters. This is an area almost one-quarter the size of the entire forest preserve owned by the State previous to the bond issue, which has been gradually accumulated since the year 1883.

Absolutely no property is recommended for purchase to the Commissioners of the Land Office until it has been completely examined and appraised by the experts of the Conservation Commission. This painstaking method of careful survey and valuation assures to the people of the State full value for every dollar expended.

Of the 411,650 acres of which the Conservation Commission has completed its inspection, it has agreed upon a price for 171,045 acres and recommended their purchase to the Commissioners of the Land Office. This board has so far approved the acquisition of 156,398 acres—135,398 in the Adirondacks and 21,000 in the Catskills—and passed the cases on to the office of the Attorney-General for the necessary examination of titles. The lands purchased in the Adirondacks average \$5.79 per acre, and those in the Catskills \$7.10 per acre. Altogether a total expenditure of over \$900,000 is involved.

"This vast area," says Commissioner Pratt, "comprises some of the wildest and most beautiful regions in New York State or indeed in the whole of North America. High mountain peaks, lakes of exquisite beauty—but hitherto inaccessible to the public

through private ownership—rushing streams and cascades, which in the past have probably not been seen by a dozen persons a year, as well as virgin forests of both hard and soft wood, are included in the territory. Apart from all other considerations, much of this land should become the property of the people for its scenic value alone, as have the famous national parks in the west. From an economic standpoint must be added the fact that the Adirondacks and the Catskills provide the present and future water supply of our most thickly populated regions, protect the headwaters of the State's greatest river systems, and regulate their flow both for industry and navigation. Indeed, the very climate of the State itself, and the rainfall upon which agriculture is dependent, are largely affected by the forest growth upon these very mountain areas."

AMENDMENT TO THE CONSTITUTION TO BE VOTED UPON
ELECTION DAY

Permitting the building of a State road across the Forest Preserve in the Adirondacks—reasons for voting favorably upon the amendment.

(Dated October 26, 1918)

The building of a State highway through one of the most beautiful sections of the Adirondack mountains will be made possible by approval of "Amendment No. 2," which is to be submitted to the voters of the State on election day, having been approved by the Legislature in two successive years.

The amendment relates to article 7, section 7, of the State Constitution, which at present provides that "the lands of the State now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law, shall be forever kept as wild forest land. They shall not be leased, sold or exchanged or taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed."

As construed by the Attorney-General this provision prevents

even the construction by the State of a highway across its own lands. One of the State highways, authorized by law in 1909, is known as route 25. The description carries this route from Utica north to Old Forge, east to Raquette lake and Blue Mountain lake, north to Long lake, and thence south to Chestertown, Lake George and Saratoga Springs. Macadam State roads have already been completed on this route from Utica to Old Forge and from Long lake to Saratoga Springs. The short intervening piece between Old Forge and Long lake includes about twenty-five miles where there is now a dirt-road and twelve miles of unopened State land. The twelve miles across State land can never be built unless the Constitution is amended.

Conservation Commissioner George D. Pratt is strongly in favor of the proposed amendment as providing the only means of access into the heart of the Adirondacks from the west and southwest. At present this mountain tract of wonderful scenic beauty, much of which has already been acquired by the State as a park for the benefit of all the people, can be entered only from the Albany district by way of Lake George or from the northern district by way of Plattsburgh and Malone.

An additional advantage of the completion of route 25 will be in providing a continuous highway by which travelers may pass through the Adirondacks from east to west instead of being compelled to retrace their steps as at present.

Article 7, section 7, the object of which is prevention of the forest from exploitation, was inserted in the Constitution prior to the movement for improved roads in the State. Commissioner Pratt believes that it was never intended to prevent the State from constructing a needed highway across its own land. He therefore urges the people of the State to approve the amendment and in this way provide additional means for enjoying the wonderful natural attractions of New York's Forest Preserve, which the people have themselves acquired and paid for.

STATE INDUSTRIAL COMMISSION

In the Matter of the Claim of FRED SCHMAUSS, for Compensation under the Workmen's Compensation Law, against A. DUTCH & Co., Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. B-2487

(Decided May 29, 1918)

Injuries sustained by Fred Schmauss while employed by A. Dutch & Company.

The claimant herein was sent on a business trip by his employer from Buffalo to Niagara Falls, and while returning on a railroad train there was a collision between the train and a truck loaded with lumber. In endeavoring to see what was the matter claimant fell and broke his arm, from which accident this claim arises. An award was made by the Deputy Commissioner, but the question now arises as to whether the accident arose out of the employment. *Held*, that an injury "arises out of the employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." Award sustained.

An award was made in this case by the Deputy Commissioner who heard the evidence. There is no dispute on the facts and the case comes before us to review the findings of the deputy on the question whether the accident arose out of the employment.

Claimant in person.

Amos H. Stephens (James A. Gosnell, of counsel), for the employer and carrier.

SAYER, Commissioner.—The claimant was sent on the business of his master from Buffalo to Niagara Falls and while returning on a railroad train, there was a collision between the train and a truck loaded with lumber. The passengers were somewhat shaken

up and it seems that considerable excitement prevailed. The claimant went to the platform of the car and endeavored to see what was the matter. In so doing he fell and broke his arm, and from that occurrence this claim arises.

While the employee was on the train on his way home he was undoubtedly in the course of his employment. While traveling on a car upon the master's business any accident that occurred to the employee by reason of the risk incidental to such travel arises out of as well as in the course of the employment (*Redner v. Faber*, 180 App. Div. 127), but was the accidental occurrence fairly incidental to his traveling upon a train, or did the employee in going upon the platform to see what was happening take himself out of his employment? I think he did not. I think he did the thing that any ordinary and reasonable individual would have done under similar circumstances.

An injury "arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment." *McNichol v. Employers' Liability Assurance Corporation*, 215 Mass. 497, cited with approval by the Appellate Division in *Newman v. Newman*, 169 App. Div. 745.

The award of the deputy should be sustained.

On the 29th day of May, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of HARRY ABRIAL, for Compensation under the Workmen's Compensation Law, against GREASONIA PAPER MILLS, INC., Employer; OCEAN ACCIDENT AND GUARANTEE CORPORATION, Insurance Carrier

Case No. 22214

(Decided May 29, 1918)

Injuries sustained by Harry Abrial while employed by Greasonia Paper Mills Co., Inc.

The original award in this case was set aside by the Commission on the strength of a decision of the Court of Appeals. The case was reheard on the representation of the attorney for the claimant that the facts if properly understood made such decision inapplicable. It appears that claimant, who had been working for a number of hours and had become exhausted, was directed to sit down and rest. While so resting he fell asleep and was struck by a tram car which jumped the platform on which it ran, a considerable distance from where claimant was lying. *Held*, that claimant was rightfully on his employer's plant during working hours and that the car would leave the platform on which it was usually pushed was one of the risks of the business. The previous action of the Commission should be rescinded, the previous award reinstated and the case continued.

An award was made in this case by Deputy Commissioner Richards which the Commission set aside on the strength of the decision of the Court of Appeals in *Gifford v. Patterson*, 222 N. Y. 4.

On the representation of the attorney for claimant, that the facts if properly understood made the *Gifford* case inapplicable, the case was given a further hearing, additional testimony was taken and a sketch and photographs of the premises were introduced in evidence. The former decision disallowing the claim was made on the theory that claimant by lying down and dosing off abandoned his employment, as the court held in the *Gifford* case. Whether this is correct or not is the only question in the case.

R. S. Johnson, for claimant.

T. H. Preston, for insurance carrier.

LYON, Commissioner.—I must confess to have misunderstood the situation when I recommended the disallowance of the claim on the ground of the Gifford decision. It appeared at that time, that claimant was injured by a tram car running off its track and striking him while lying down to rest. It now appears that the so-called tram car did not run on a track at all, but ran on an elevated platform on which it was pushed by hand and that it jumped the platform and struck claimant, who was lying at a considerable distance from the place where the car should have run.

In this case the claimant had worked long hours and having become exhausted was told by his superintendent, "You are near all in. Sit down here and rest yourself." While so resting on a pile of paper at a considerable distance from the elevated place where the car ran, he was struck by the car which had jumped the platform on which it ran. This is manifestly a different thing from dropping down to rest of his own motion where the car moving on a track would hit him. On these facts the Gifford case is clearly not fatal to this claim. In that case Mr. Gifford of his own motion and while alone sat down, went to sleep and fell out of an open door. The opinion in that case clearly points out what I think is the controlling distinction between this case and that. It was there said: "If in connection with his employment, he was authorized or permitted to procure a chair and spend a portion of his time 'dozing off' in the doorway, it was not shown before the Commission."

Here claimant was directed to sit down and rest. That he fell asleep did not in any sense contribute to his injury. In the Gifford case the falling asleep caused Gifford to plunge out of the door to his death. Claimant was rightfully on his employer's plant during working hours, and that the car would leave the platform on which it was usually pushed, was one of the risks of the business.

Previous action of the Commission should be rescinded, the previous award reinstated and the case continued.

On the 29th day of May, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of CATHERINE LINGNER, Mother, for Compensation under the Workmen's Compensation Law, for the Death of FREDERICK LINGNER, against JOHN W. McGRATH, Employer

Death Case No. 63064

(Decided May 29, 1918)

Injuries sustained by Frederick Lingner, resulting in his death, while employed as manager of a shooting gallery by John W. McGrath at Coney Island — application to reopen case denied.

On August 6, 1917, Frederick Lingner, who was employed as manager of a shooting gallery by John W. McGrath at Coney Island, after cleaning and loading some guns left them lying on the counter. He was behind the counter talking with some girls in front of the gallery when he leaned over, apparently to get something from under the counter. One of the girls carelessly ran her hand over the guns lying on the counter, evidently touching the trigger of one of them, which was discharged, the bullet therefrom entering the neck of deceased, killing him almost instantly. This claim was denied by the Deputy Commissioner, and now comes on for reconsideration at the instance of the claimant, the mother of deceased, whose attorney insists that the accident can be brought under group 25 of section 2 of the Workmen's Compensation Law. *Held*, that deceased was not at the time of the accident engaged in either the manufacture, storing or handling of ammunition within the meaning of the Compensation Law. Application denied.

The claimant is the mother of Frederick Lingner who met his death on the 6th day of August, 1917. Frederick Lingner was the manager of a shooting gallery for the employer, John W. McGrath, and as such manager had the duty of over-seeing the shooting gallery of the employer at Coney Island, the loading of the guns which the customers used in shooting at various moving objects in the gallery. His duty was to clean the guns, see that they were properly loaded with ammunition which the employer furnished. The employer testified that he would have on hand as many as ten thousand rounds of ammunition at a time. The exact testimony in that regard is as follows: "Q. How much ammunition do you keep there?—how large a quantity? A. We have as a rule a case of 10,000 on hand. Q. Ten thousand

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cartridges? A. Yes, but not on the counter though. Q. How large are they? A. Twenty-two calibre. Q. About how many guns do you have? A. Why, there is an average of about ten. Q. Ten guns on the counter? A. Yes."

On the day of the accident the deceased had left the guns loaded lying on the counter in front of the shooting gallery and he, himself, was behind the counter. While talking with some girls who had come along in front of the gallery, the deceased leaned over, apparently to get something from under the counter, when one of the young ladies carelessly ran her hand over the guns lying on the counter, and evidently touched the trigger of one of them which was thereby discharged and the bullet entered the deceased's neck severing the jugular vein, from which he died almost instantly.

The claim was denied by the Deputy Commissioner and now comes on for reconsideration at the instance of the claimant.

Warren Schenck, for claimant.

John W. McGrath, employer, in person.

LYON, Commissioner.—It is not claimed that shooting galleries are covered by the Workmen's Compensation Law. It is strenuously insisted, however, by the attorney for the claimant that this accident can be brought under group 25 of section 2, which provides, among other things, that the "Manufacture, storing or handling of explosives and dangerous chemicals, corrosive acids or salts, gasoline, petroleum, gun powder or ammunition" is covered by the Compensation Law.

I think there can be no question but that the accident arose out of and in the course of decedent's employment, but I am unable to see how it can be said to have arisen out of either the manufacture, the storing or the handling of gun powder or ammunition within the meaning of the law. We have been admonished by the appellate courts that the principle *ejusdem generis* must be applied to the construction of this law, in other words, that words, like persons, have to be judged by the company they keep. Manifestly, the deceased was not, at the time of the accident,

engaged in either the manufacture or the storing of ammunition, nor do I think he was engaged in the handling of ammunition within the meaning of the term just referred to. As matter of fact, he was not at the time of the accident doing anything whatever with ammunition. If there was any handling of ammunition done at all, it was by the unfortunate girl who caused the accident.

It is claimed that, because the owner of this shooting gallery had on hand sometimes as many as 10,000 cartridges this makes the duty of the manager that of handling cartridges, but it will be noticed that this large number of cartridges was said by the witness to be carried in a case. If the decedent had been handling this case of cartridges and an explosion had taken place, it may be that it could be held that the accident was due to the handling of ammunition. A careful consideration of group 25 leads me to the conclusion that the handling referred to there was intended to be handling in bulk, while in the process of dealing with the explosive and ammunition as a mercantile product, and that the term handling did not pass with the ammunition to the manipulation of a single cartridge, or perhaps of a half dozen cartridges which would be placed in a gun at one time for the purpose of use by the public. I quite agree with the ruling of the deputy, when he said: "It is true that the Compensation Law should be liberally construed. However, I cannot conceive of any interpretation of the amended group as it now stands including the handling or storing of explosives, no matter how liberal a construction we put upon it, that would apply to a shooting gallery that is conducted for the pleasure of passers-by. There might be some risk attached to this occupation, but it certainly is not handling of explosives as was contemplated by the legislature in making the amendment of 1917."

I think, therefore, the application of the claimant to re-open the case must be denied.

On the 29th day of May, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of **FREDERICK H. MEYER**, for Compensation under the Workmen's Compensation Law, against **MEYER & LANGE**, Employer; **TRAVELERS' INSURANCE COMPANY**, Insurance Carrier

Case No. 100,031

(Decided May 29, 1918)

Injuries sustained by Frederick H. Meyer while employed as a salesman by Meyer & Lange in New York city.

The claimant herein was employed as a salesman for the firm of Meyer & Lange, and had as a part of his duties the collection of outstanding accounts due the firm. On the day on which the accident occurred he was given an account of about \$300 to collect from a firm in Long Island City. While on the way to the subway, where he was to take a train for Long Island City, claimant slipped on the street and received the injury for which compensation is being sought. The only question herein is whether this accident happening in the street is covered by the Compensation Law. *Held*, that where work involves exposure to the perils of the streets a workman can recover for any injuries so occasioned. Award made.

The claimant in this case was a salesman for the firm of Meyer & Lange and had as a part of his duties the collection of outstanding accounts due the firm. On the day of his accident he was given an account of about \$300 to collect from a firm in Long Island City. In order to reach Long Island City it was necessary for him to take a subway train to the Pennsylvania station and at about John and William streets in the city of New York, while on the way to the subway he slipped on the street and received the injury for which compensation is being sought. The only question in the case is whether this accident happening in the street is covered by our Compensation Law.

Claimant in person.

E. A. Willoughby, for insurance carrier.

LYON, Commissioner.—The case has been held in abeyance pending a decision of the Court of Appeals in the case of *Redner v. Faber*. That decision has now been rendered and in my opinion completely covers this case. 223 N. Y. 379. The Court of Appeals in this case, said: "In *Matter of Grieb*, the court cited with approval the decision of the English courts in the case of *Dennis v. White & Co.* (1917 App. Cas. 479). *Dennis v. White & Co.* was a case where the employee was injured while traveling in a public street, and in that respect more closely resembles the present case than *Matter of Grieb*. Both parties to the present appeal cite as authority for their arguments the English cases. Those cases are not in complete harmony as to the employer's liability on what are called street risks. *Dennis v. White & Co.* is a late case and the court said: 'If a servant in the course of his master's business has to pass along a public street, whether it be on foot or on a bicycle or on an omnibus or car, and he sustains an accident by reason of the risk incidental to the streets, the accident arises out of as well as in the course of his employment. * * * The use of the streets by the workman merely to get to or from his work of course stands on a different footing altogether, but as soon as it is established that the work itself involves exposure to the perils of the streets the workman can recover for any injuries so occasioned.'"

After making this quotation, the court in the *Redner* case said: "That is a satisfactory statement of the law. In the present case the superintendent of the *Faber* factory directed *Redner* to go from his factory to the *Winship* factory and for this purpose he crossed *Meadow* street. After completing his work, and while returning across the street, he fell on the ice or snow and received his injuries. Within the principle of the cases cited, the award of compensation to his widow was proper."

In my opinion this leaves nothing to be said about the present case, except that it is completely covered by the decision in the *Redner* case and that an award must be made and I so advise.

On the 29th day of May, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

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In the Matter of the Claim of VINCENZO CIMMINO, for Compensation under the Workmen's Compensation Law, against JOHN T. CLARK & SON, Employer; THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Insurance Carrier

Case No. 48817

(Decided May 31, 1918)

Injuries sustained by Vincenzo Cimmino while employed as a longshoreman by John T. Clark & Son in New York city.

On February 26, 1918, Vincenzo Cimmino, while employed as a longshoreman by John T. Clark & Son of New York city, and while engaged in the regular course of his employment on board a ship, fell on the deck and sustained injuries to the right wrist, which injuries disabled him from the date of said accident to May 21, 1918, and on that date he was still disabled. Award made and claim continued.

Vincenzo Cimmino sustained his injuries on February 26, 1918. This was subsequent to the amendment of sections 24 and 256 of the Judicial Code of the United States, saving the claimants the rights and remedies under the Compensation Law in any State. This claim came on for hearing before this Commission at New York city on April 26, 1918 and May 31, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Nadal, Jones & Mowton, attorneys for employer and insurance carrier.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On February 26, 1918, the day when Vincenzo Cimmino received his injuries, he resided at No. 147 Sackett street, Brooklyn, New York, and was employed by John T. Clark & Son of No. 116 Broad street, New York city, engaged in business as stevedores. Vincenzo Cimmino was employed as a longshoreman.

On February 26, 1918, Vincenzo Cimmino was working for his employer on the steamship *Cristobal* at Twenty-ninth street, Brooklyn, New York, and while engaged in the regular course of his employment, while aboard ship he slipped and fell on the deck and sustained injuries to the right wrist consisting of a fracture of the lower epiphysis of the radius, which resulted in reduced grasping power of the hand, and which injuries disabled him from the date of said accident to May 21, 1918, and on that date he was still disabled.

The average weekly wage of Vincenzo Cimmino was the sum of twenty-five dollars and ninety-six cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but neither employer nor insurance carrier was prejudiced by such failure, if any.

Award of compensation is hereby made against John T. Clark & Son, employer, and Fidelity and Casualty Company of New York, insurance carrier, to Vincenzo Cimmino, injured employee, for a period of twelve weeks from February 26, 1918 to May 21, 1918, at the rate of fifteen dollars, and this claim is hereby continued for further hearing.

The failure, if any, of Vincenzo Cimmino to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that neither employer nor insurance carrier was prejudiced by such failure.

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In the Matter of the Claim of CHARLES GOLDBERG, for Compensation under the Workmen's Compensation Law, against A. HALL BERRY, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Case No. 51717

(Decided May 31, 1918)

Injuries sustained by Charles Goldberg while employed as an operator of a punch press by A. Hall Berry in New York city.

On October 3, 1917, Charles Goldberg, while employed as an operator of a punch press by A. Hall Berry, engaged in the manufacture and assembling of electrical goods in New York city, caught his left index finger in the punch press, sustaining injuries thereto equivalent to the loss of one-half of said finger. Award made.

Charles Goldberg received his injuries on October 3, 1917. On October 26, 1917, the employer and injured employee entered into a written agreement for the payment of compensation on account of said injuries based on the average weekly wage of five dollars and seventy-seven cents. Thereafter, this claim came on for hearing before this Commission at New York city on February 15, 1918, May 17, 1918, and May 31, 1918.

Robert W. Bonyngue, counsel to State Industrial Commission.

Alfred E. Andrews, attorney for employer and insurance carrier.

Claimant in person.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On October 3, 1917, the day when Charles Goldberg received

his injuries, he resided at No. 981 Fox street, New York city, and was employed by A. Hall Berry of No. 71 Murray street, New York city, engaged in the manufacture and assembling of electrical goods, with a plant or place of business located at No. 487 Greenwich street, New York city. Charles Goldberg was employed as an operator of a punch press in the assembling department.

On said date, Charles Goldberg was working for his employer at his employer's plant, and while engaged in the regular course of his employment, his left index finger was caught in the punch press, which he was operating, and he sustained a compound fracture of said finger, resulting in a deformity to the terminal phalanx, with the loss of a portion of the bone thereof, constituting the equivalent loss of one-half of said finger.

At the time of said accident, Charles Goldberg was of the age of eighteen years. Under normal conditions his wages would be expected to increase. The average weekly wage of Charles Goldberg at the time of said injury, taking into consideration the fact that under normal conditions his wages would be expected to increase, is determined at eleven dollars and fifty-four cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given. Both the employer and insurance carrier are also estopped from raising any question in respect to said notice by reason of the written agreement for the payment of compensation entered into as hereinbefore noted.

Award of compensation is hereby made against A. Hall Berry, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Charles Goldberg, injured employee, for twenty-three weeks at the rate of seven dollars and sixty-nine cents per week from October 3, 1917, to February 13, 1918, being for the loss of one-half of the left index finger.

It is presumed under section 21 of the Compensation Law that sufficient notice of injury was given to the employer. Both

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employer and insurance carrier are estopped from raising any question in respect to the failure, if any, to give written notice of injury within ten days after disability by reason of the written agreement for the payment of compensation entered into between the employer and injured employee.

In the Matter of the Claim of ALLIE HOBERTIS, for Compensation under the Workmen's Compensation Law, against COLUMBIA SHIRT Co., INC., Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier

Case No. 9747

(Decided June 5, 1918)

Injuries sustained by Allie Hobertis while employed as a hand stamper of shirts in the cutting department of the Columbia Shirt Co., Inc., in New York city.

On February 23, 1917, Allie Hobertis, while employed as a hand stamper of shirts in the cutting department of the factory of the Columbia Shirt Co., Inc., a corporation engaged in the manufacture of shirts in New York city, was struck on the side of the left eye by a bundle of goods which was being passed from one employee to another, sustaining injuries thereto which resulted in the permanent loss of use of said eye. Award made.

This claim came on for hearing before State Industrial Commission at Albany, N. Y., on May 29, 1917, July 11, 1917, September 19, 1917, October 31, 1917, January 2, 1918, and June 5, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Walter S. Archibald, attorney for employer and insurance carrier.

Brinnier & Canfield, attorneys for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On February 23, 1917, the day when Allie Hobertis received her injuries, she resided at No. 40 Van Buren street, Kingston, N. Y., and was employed by Columbia Shirt Co., Inc., of No. 729 Broadway, New York city, engaged in the manufacture of shirts with a plant or factory located at No. 55 O'Neill street, Kingston, N. Y. Allie Hobertis was employed as a hand-stamper of shirts in the cutting department at said factory.

On February 23, 1917, Allie Hobertis was working for her employer at her employer's plant, and while engaged in the regular course of her employment, she was struck on the side of the left eye by a bundle of goods, which was being passed from one employee to another employee, and she thereby sustained injuries to the left eye consisting of the detachment of practically all of the lower half of the retina of the left eye, and which injuries resulted in the permanent loss of use of said eye.

The average weekly wage of Allie Hobertis was the sum of five dollars and seventy-seven cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given.

Award of compensation is hereby made against Columbia Shirt Co., Inc., employer, and Zurich General Accident and Liability Insurance Company, Ltd., insurance carrier, to Allie Hobertis, injured employee, for a period of 128 weeks at the rate of five dollars per week, beginning on March 9, 1917, for the permanent loss of use of the left eye.

It is presumed under section 21 of the Compensation Law that sufficient notice of injury was given to the employer.

In the Matter of the Claim of **HULDA BARRINGER**, for Compensation under the Workmen's Compensation Law, against **GEORGE H. CLARK**, Employer; **ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY**, Insurance Carrier

Case No. 22326

(Decided June 5, 1918)

Injuries sustained by Hulda Barringer while employed in feeding a mangle in the power laundry of George H. Clark in Saratoga Springs, N. Y.

On August 28, 1916, Hulda Barringer, while employed by George H. Clark, engaged in the business of a power laundry in Saratoga Springs, N. Y., was engaged in the regular course of her employment in feeding a hot mangle, when her left hand was caught in said mangle and she sustained serious burns and injuries thereto, necessitating the amputation of parts of certain fingers and rendering the hand permanently useless, which condition is considered as the equivalent to the loss of such hand. Award made.

This claim came on for hearing before State Industrial Commission at Albany, N. Y., on October 29, 1917, and January 30, 1918; at New York city on February 19, 1918; at Albany, N. Y., on April 24, 1918; at New York city on May 29, 1918, and at Albany, N. Y., on June 5, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Alfred W. Andrews (Walter S. Archibald, of counsel), attorney for employer and insurance carrier.

Benjamin P. Wheat, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On August 26, 1916, the day when Hulda Barringer received the injuries which resulted in the permanent loss of use of her left hand, she resided at No. 61 Second street, Saratoga Springs, N. Y., and was employed by George H. Clark of 24 and 26 Andrews street, Saratoga Springs, N. Y., engaged in the business of a power laundry at that address. Hulda Barringer was employed in feeding a mangle.

On said date, Hulda Barringer was working for her employer at her employer's plant, and while engaged in the regular course of her employment while feeding a hot mangle used for flat work her left hand was caught in said mangle, and she sustained injuries which resulted in the amputation of the index, middle and ring fingers of the left hand back of the head of the metacarpal bones at about one-quarter of an inch back of said bones; the little finger was amputated at the second joint, also taking off the head of the first phalange of the said little finger; the end of the thumb was torn at the tip; the palmar surface of the left hand was slightly burned, a burn of about the first degree, and so much burned that the tissues of the posterior surface of the hand had to be brought over to the palmar surface; the scar tissue on the palmar surface of the hand extends back about an inch and a quarter from the middle finger gradually tapering out to both ends and resulting in tenderness over the scar; the near side of the left thumb has lost part of the pulpy tissue and has likewise become smaller through disuse.

From the examination of the hand of the claimant herein, and taking into consideration all the testimony and the fact that from the present examination of the injured hand it appears that claimant has no useful use of the hand, this Commission finds that the condition is equivalent to the loss of the use of such hand, and that there is a permanent loss of use of the left hand, considered as the equivalent of the loss of such hand.

At the time of said accident Hulda Barringer was of the age of sixteen years. Under normal conditions her wages would be expected to increase. Taking into consideration the fact that under normal conditions her wages would be expected to increase,

her average weekly wage is determined at the sum of eleven dollars and fifty-four cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but neither employer nor insurance carrier was prejudiced by such failure, if any.

Award of compensation is hereby made against George H. Clark, employer, and Zurich General Accident and Liability Insurance Company, Ltd., insurance carrier, to Hulda Barringer, injured employee, for a period of 244 weeks at the rate of seven dollars and sixty-nine cents weekly for the equivalent loss of the left hand.

The failure, if any, of Hulda Barringer to give written notice of injury to her employer within ten days after disability is hereby excused on the ground that neither employer nor insurance carrier was prejudiced by such failure, if any.

In the Matter of the Claim of **KATHERINE FLANNERY**, for Compensation under the Workmen's Compensation Law, against **GEORGE C. GOEBEL**, Employer; **ÆTNA LIFE INSURANCE COMPANY**, Insurance Carrier

Case No. 1813-A

(Decided June 11, 1918)

Injuries sustained by Katherine Flannery while employed as a waitress by George C. Goebel at Schroon Lake, N. Y.

The claimant herein was employed as a waitress by George C. Goebel in a hotel at Schroon Lake, N. Y. This hotel consisted of several separate buildings which were run by the same person as a single business. On the day on which the accident occurred claimant had finished her day's work about nine o'clock in the evening and was on her way from the main house to her own quarters in another building on the premises. She stopped with another girl to watch the dancing in the grill and then started on to her room. She tripped over a pipe across the path and fell, sustaining the injury out of which this claim arises. An award was made in this case by the Deputy Commissioner and the matter now

comes on for review at the instance of the insurance carrier, the two questions presented being as to whether the employment was covered by the law and whether the accident arose out of and in the course of the employment. Award confirmed.

An award was made in this case on March 28, 1918, by the deputy commissioner, for sixteen and one-half weeks at \$8.46, amounting in all to \$139.59. The insurance carrier has asked that the action of the deputy be reviewed by the Commission and on May third a hearing was held, additional testimony taken and arguments heard.

Claimant in person.

T. Carlyle Jones and James Johnson, for the insurance carrier.

SAYER, Commissioner. — Two questions are presented here, *first*, whether the employment was covered by the law, and *second*, whether the accident arose out of and in the course of the employment.

The claimant was a waitress in a hotel at Schroon Lake in the Adirondacks. The law as amended covers hotels having fifty or more rooms. This hotel was in several separate units, no one of which contained in itself as many as fifty rooms. There was a large house containing thirty-four rooms, and the general dining room. This was called the Manor House. There were in addition some twelve other cottages located in the grounds of the Manor House, each having from four to nine rooms. The families living in the cottages took their meals at the main dining room at the Manor House. The whole establishment was run by the same person as a single business and clearly to my mind constituted a hotel having more than fifty rooms. It follows that the business as a whole is under the law.

The claimant, having finished her day's work about nine o'clock in the evening, was on her way from the main house to her own quarters in another building on the hotel premises. There were

two paths by which to go, one in front and the other in back of the hotel. She had the right to go by either, and under the settled law in this State was in her employment while going from her place of employment to her home, on her employer's premises, so long as she went in a usual way and with reasonable promptness. Either way she took would take her past the grill, where on this evening an entertainment was in progress. She stopped with another girl to watch the dancing and then started on to her room. She tripped over a pipe across the path and fell, sustaining the injury out of which this claim arises. Had she proceeded directly to her room without stopping, there would be no question of her being in her employment. Did her stopping take her out of her employment on the remainder of the walk down the path to her home? I think not. She was not injured while watching the dancing. The length of time she spent did not enter into the risk, nor operate unfavorably. What she did was what an employee of a summer hotel would naturally do and was reasonably incidental to her employment. I think the award should stand as made by the deputy.

On the 11th day of June, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of **FREDERICK C. GORDON, JR.**, for Compensation under the Workmen's Compensation Law, against **HOLBROOK, CABOT & ROLLINS CORPORATION**, Employer; **TRAVELERS' INSURANCE COMPANY**, Insurance Carrier

File No. 41693

(Decided June 11, 1918)

Rehearing of claim for injuries sustained by Frederick C. Gordon, Jr., while employed by Holbrook, Cabot & Rollins Corporation — sufficiency of notice given.

The question involved herein is merely as to the sufficiency of notice given in behalf of the claimant to his employer as to having sustained

the injuries complained of. The claim was before the Commission and was determined by the making of an award for the loss of an eye. The Appellate Division, however, reversed this determination because it did not appear in the record that the notice of the accident was given within the required time and that there was no proof that the employer and insurance carrier were not prejudiced by such failure. Thereupon the matter having come on for further hearing, and after the taking of extensive testimony, the Commission determined that unquestionably the defendant has lost the use of his eye. As to whether his vision was not impaired before the injury is a question which was carefully considered at the previous hearing and the overwhelming testimony is that despite a cast in the eye that member was a useful organ for the claimant's purpose of business before the accident. The reversal by the Appellate Division was solely on the question of notice. *Held*, that the written notice given by the claimant's mother completely satisfies the provisions of section 18 as to the giving of notice of injury, and that the former decision with reference to the extent of the injury was correct and that the award should now be made as before for the total loss of vision of the claimant's eye.

An award for loss of an eye was made in this case which was reversed by the Appellate Division because it did not appear in the record that the notice of the accident was given within ten days after disability and no sufficient reason was given for determining that the employer and insurance carrier were not prejudiced by such failure. The matter came on for further hearing and after quite extensive taking of testimony comes on now for determination. There is no question but that the claimant has lost the use of his eye. That seems to be conceded by everybody. There is some question, however, whether his vision was not impaired before this injury. That question and the question of giving of notice of the injury are the only ones to be determined.

Joseph V. Gallagher, for claimant.

E. A. Willoughby, for insurance carrier.

LYON, Commissioner. — The claimant was not disabled by his injury until the 21st day of May, 1916, and the ten days within

which he could, under the statute, give written notice of his accident therefore did not expire until the 31st day of May, 1916. The claimant's mother wrote a letter dated May twenty-sixth to Dr. Hunter, in care of the company, stating that the claimant had been absent from work due to an injury received to his eye while working, by the entry of a piece of hot steel. This letter, in my opinion, was sufficient written notice under the statute, provided it reached the proper parties connected with the employer. The chief clerk at the field office of the employer was called as a witness and stated that, while Dr. Loomis was the regular attending physician for the employer, Dr. Hunter was the man who had charge of the office most of the time and treated all the cases although he was paid by Dr. Loomis and not by the employer. The testimony also is that it was customary for all injuries to be reported to Dr. Hunter and that Dr. Hunter would immediately then report it to the proper officials of the employer. In fact, Dr. Hunter, who is out of the State of New York, sent an affidavit which was received in evidence in which he states that, in regular course, this letter written by claimant's mother would be turned over either to Mr. Radley or to his assistant, Mr. Lowe, who was in charge of the office. This letter was produced from the files of the Travelers' Insurance Company and there is no testimony whatever to show that it did not reach the firm of Holbrook, Cabot & Rollins Corporation within a day or two after its date. In fact all the testimony goes to show that it did reach the firm at least before the ten-day period had expired.

I am thoroughly convinced that the written notice given by the claimant's mother completely satisfies the provisions of section 18 relative to the giving of notice of injury.

The question whether the claimant was partially blind in this eye before the accident was carefully gone into at the previous hearing, and there is nothing in the record now to change the decision of the Commission that the claimant had useful vision of this eye before the accident, and in fact, while there is some evidence that he had a slight injury to this eye in boyhood, by which it had a certain cast or turn, the overwhelming testimony is

that, notwithstanding this earlier injury, the eye was a useful organ for the claimant's purpose of business before the accident.

This testimony was before the Appellate Division when the case was there heard, and inasmuch as the reversal was solely on the question of notice, it is strenuously insisted that that court has already decided that the extent of the injury was properly found by the Commission, otherwise the reversal would have been on both grounds. Be that as it may, I am convinced that the former decision with reference to the extent of the injury was correct and that the award should now be made as before for the total loss of vision of the claimant's eye.

On the 11th day of June, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claims of PHILIP FREY, Alleged Dependent Father, and BARBARA FREY, Alleged Dependent Mother, for Compensation under the Workmen's Compensation Law, for the Death of MARY FREY, against McLOUGHLIN BROS. INC., Employer; EMPLOYERS LIABILITY ASSURANCE CORPORATION, Insurance Carrier

Death Case No. 50968

(Decided June 11, 1918)

Rehearing of claims filed by the parents of Mary Frey, as dependents, for injuries sustained by the said Mary Frey, deceased, while employed by McLoughlin Bros., Inc.

On August 10, 1917, while working for McLoughlin Bros., Inc., in the city of Brooklyn, Mary Frey was injured by accidentally running a nail through her finger, nailing the latter fast to a box. Blood poisoning resulted and she died on August 17, 1917. Claims were filed by Philip Frey and Barbara Frey, the father and mother of the deceased respectively, as dependents. The claims were disallowed by the deputy commissioner after a hearing and on the application of the claimants the matter was reheard by the Commission on March 1, 1918. *Held*, that

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from the testimony adduced on the rehearing in this case there were a father and mother struggling along, living frugally, while the deceased daughter was working and contributing as best she might. Also held, that the fact that the father owned an incumbered small tenement property in New York city does not warrant the assumption that the family was not in some part dependent upon the earnings of the daughter; that the mother at least was so dependent. Award made.

Mary Frey was injured August 10, 1917 while working for McLoughlin Bros. Inc., in the city of Brooklyn. On that day deceased accidentally ran a nail through her finger nailing it fast to a box. Subsequently blood poisoning set in and the deceased died on August 17, 1917. Claims have been filed by Philip Frey and Barbara Frey, the father and mother of the deceased, respectively, as dependents. These claims were disallowed by the Deputy Commissioner after a hearing on January 9, 1918. On the application of the claimants, the matter was reheard before the Commission on March first.

It appears that the mother is forty-six years of age, while the father is forty-four. The deceased was the only child and she was nineteen years of age at the time of her death. The deceased lived at home with her father and mother. It was testified that the deceased gave all of her earnings to her mother. She earned \$7 a week with a bonus toward the end. The father of the deceased was earning at the time of the death of the deceased, \$19 a week, which he turned over to his wife. The father owned a four family house in the borough of Brooklyn, New York city, which was assessed last year for taxes by the city of New York at the sum of \$4,500. On this house there is a \$2,500 mortgage and the family lived in a part of the house, there being three other families in it. In addition the father had \$1,000 in the savings bank which he had accumulated out of his earnings to meet the mortgage when it became due. He has interest and taxes to pay besides a water tax and it was testified that the previous year there was a special assessment of more than \$500 on account of the sewer. Mrs Frey testified that she does the janitor work in the building.

Question is as to the dependency of the father and mother.

Jetmore & Jetmore, for the claimants.

William L. Tufts, and Jeremiah F. Connor, for the employer and insurance carrier.

SAYER, Commissioner.—If the parents of Mary Frey were in part dependent upon her earnings at the time of her injury and death, they are entitled to an award of compensation here. The deceased was an unmarried girl living at home with her parents. It is in evidence that her earnings were turned over every week to her mother who gave back to her such money as she required for carfare and other expenses aside from living. These earnings amounted to six dollars per week when she first began to work. Later she got seven dollars a week with a bonus. While the question of wages is somewhat in dispute, there is reason to believe that they amounted to from eight dollars to ten dollars a week. It is contended on the part of the insurance carrier that because the father of the deceased was a thrifty man and had saved out of his wages over a period of years past enough money to buy a small equity in a city house and to lay by one thousand dollars to meet his obligation under the mortgage, that thereby we must conclude that neither the father nor the mother were dependent upon the earnings of their deceased daughter. I think it is rightly contended that in this case the father whose earnings at the time of his daughter's death were nineteen dollars a week was not a dependent and as to his claim, I believe the decision of the deputy commissioner was correct. As to the mother, I think the situation is different. She acted as treasurer of the household, both her husband and her daughter turning over their earnings to her. In addition she acted as janitor of the little house that her husband owned. She provided for the family buying groceries and other necessities. We cannot speculate as to the exact amount that it cost to board and lodge the deceased. From the testimony, however, we have some insight into the rather meagre living of the family and I think we may properly conclude that Mary's earnings did not all go for her own board and lodging.

We have had urged upon us very strongly the decision of the

Appellate Division in *Matter of Birmingham v. Westinghouse*, 180 App. Div. 48, as authority for denying the award in this case. It does not seem to me that the Birmingham case is applicable here. In that case, the deceased workman, together with his wife, were living with his parents. It did not appear in that case that there was any requirement for Harold Birmingham to live with his parents, nor that they were dependent upon him. It was apparent there that the money contributed by him was by way of board for himself and his wife.

We have in this case a mother and father struggling along and living in a frugal manner while their young daughter was working and contributing as best she might. It is true the father owns some little property. Certainly a small tenement property in the city of New York is not such an asset in these days as to warrant the assumption that the family was not in some part dependent upon the earnings of the daughter. I think the mother was. It need not be shown that the mother was wholly or largely dependent upon the earnings of her daughter. If she was in any degree dependent upon her, she would be entitled to compensation. Partial dependency is sufficient. *Matter of Rhyner v. Huber Building Co.*, 171 App. Div. 56.

Moreover, we must take into consideration the fact that the deceased was at the time of her death a minor. Her wages had increased from six dollars to around ten dollars a week. I think we may fairly assume that she would have earned, had she continued to live, at least twelve dollars a week by the time she was twenty-one years of age.

I therefore advise that we find the mother dependent upon the deceased at the time of her death, and make an award to her based upon the expectation of earnings of twelve dollars a week.

On June 11, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of FRANK JOBST, for Compensation under the Workmen's Compensation Law, against BROADWAY-FORT WASHINGTON CORPORATION, or LAWYERS MORTGAGE COMPANY, Employer; EMPLOYERS' LIABILITY INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTEE COMPANY, Insurance Carriers

Case No. 57659

(Decided June 11, 1918)

Injuries sustained by Frank Jobst while employed by the Broadway-Fort Washington Corporation.

The only question herein considered is as to the employer of the claimant. The original claim was determined by the Commission making an award but the question as to whether the claimant at the time of the accident was employed by the Broadway-Fort Washington Corporation or the Lawyers Mortgage Company was not determined, and is therefore the sole question herein. The claimant when injured was employed about certain premises in the city of New York owned by the Broadway-Fort Washington Corporation, which corporation had given a mortgage upon the property guaranteed by the Lawyers Mortgage Company. Foreclosure of this mortgage was threatened and thereupon an assignment of the rents of the property was made to the Lawyers Mortgage Company for the purpose of allowing it to retain from the net income sufficient to pay back taxes and interest. The assigning company thereupon employed agents to handle the property. *Held*, that the Lawyers Mortgage Company under the arrangement for assigning the rents merely became an agent of the owner of the property and that as owner the award must be made against the Broadway-Fort Washington Corporation, and as insurance carrier the Employers' Liability Insurance Company.

The Commission has made an award in this case amounting to \$138.60, including \$8.16 for medical attention, and closed the case, but has not determined against whom the award should be made. The claimant at the time of his injury was employed about the premises Nos. 728 and 736 West One Hundred and Eighty-first street, New York city, owned by the Broadway-Fort Washington Corporation. This corporation had given a mortgage upon the property, the payment of which mortgage the Lawyers

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Mortgage Company had guaranteed. Having failed in the payment of interest and taxes, foreclosure of this mortgage was threatened when on December 4, 1917, prior to the injury, an assignment of the rents of the property was made to the Lawyers Mortgage Company for the purpose of allowing it to retain from the net income sufficient to pay the back taxes and interest. The Lawyers Mortgage Company thereupon employed the firm of McDowell & McMahon to handle the property under this arrangement. It was while this method of working out the rents and paying taxes and interest was in force that the accident occurred.

The question to be determined is, of which corporation was the claimant an employee at the time of his injury. It is to be noted also that Mr. McDowell, one of the special agents, testified that Mr. Jobst was employed at the instance of a Mr. Sweeney connected with the Broadway-Fort Washington Corporation.

W. E. Burchell, for United States Fidelity and Guarantee Company.

William Giddes, for Employers' Liability Assurance Corporation.

LYON, Commissioner.—In my opinion the Lawyers Mortgage Company, by the arrangement made for the assignment of rents in lieu of the foreclosure, merely became the agent of the owner of the property for that purpose and that any employment which the Lawyers Mortgage Company made of the claimant, was made as agents for the Broadway-Fort Washington Corporation. Undoubtedly his wages would be taken out of the rents before any application of the rents were made to the payment of interest and taxes. The fact that one of the officers of the Broadway-Fort Washington Corporation also requested that Mr. Jobst be employed is not without significance. The employer's first report of injury, form C-2, is also made out and signed by the Broadway-Fort Washington Corporation, by William R. Sweeney, secretary and treasurer, showing that that corporation at that time supposed that they were the employer of Mr. Jobst. In my opinion

the award must be made against the Broadway-Fort Washington Corporation and its insurance carrier, Employers' Liability Insurance Corporation, and I so advise.

On the 11th day of June, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of RAFFAELE MESPOLA, for Compensation under the Workmen's Compensation Law, against AMERICAN CAN COMPANY, Employer; UNITED STATES CASUALTY COMPANY, Insurance Carrier

Case No. 100407

(Decided June 11, 1918)

Injuries sustained by Raffaele Mespola while employed by the American Can Company at its plant in Edgewater, N. J.

The question herein involved is as to whether the claimant is entitled to compensation under the New York act in view of the fact of his being injured in the State of New Jersey. The employer owns and operates a number of plants in various places in this State and in New Jersey. The company rented a pier at the foot of Ninety-fifth street, North river, Manhattan, and operated boats for the purpose of conveying its employees and persons seeking employment to its Edgewater, N. J., plant. At the New York dock it receives the applications for employment, gives a preliminary examination and furnishes applicants with transportation to the Edgewater plant. On October 18, 1917, claimant applied at the New York dock for employment by the company. He was given a preliminary examination by the employment agent of the employer and was then given a pass to Edgewater, N. J. There he was given other papers to fill out and left them with the employer. He was told he would be notified when to appear for work. Receiving no notice, he went to Edgewater on November 12, 1917, and was put to work. He sustained his injuries soon after and received compensation under the New Jersey statute from the insurance carrier in that State. The present application is under the New York act. *Held*, that if entitled to compensation under the New York act the fact of claimant's having accepted compensation in New Jersey would not debar him from receiving compensation in this State provided the employer be given credit

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for payments made in New Jersey. *Held* also, that the proof shows that the real contract was made in New Jersey and not in the State of New York, and that compensation in this State must be denied.

The employer has various plants in the State of New York, compensation for which it carries without insurance, pursuant to subdivision 3 of section 50 of our law. It also has a plant in New Jersey where it is covered by insurance issued by the United States Casualty Company. The employer having difficulty in obtaining employees for its work in New Jersey has rented a pier at the foot of Ninety-fifth street, North river, in the borough of Manhattan, from which it runs a set of boats to its plant at Edgewater, N. J., for the purpose of conveying its employees and persons seeking employment. It advertises quite extensively for employees to appear at the Ninety-fifth street dock for the purpose of employment, where it gives them a preliminary examination and then furnishes them with passes to its plant in New Jersey. The claimant on the 18th of October, 1917, went to the dock at the foot of Ninety-fifth street for the purpose of securing employment. He had been told by other employees of the employer that employment could be had and apparently had been told where to go to secure employment, although he may have seen the advertisement as well. He was given a preliminary examination at the foot of Ninety-fifth street by the employment agent of the employer and told that if employed at all he would be paid thirty cents an hour and then given the usual pass to go to Edgewater, N. J. At the plant in New Jersey he was somewhat further examined and given certain papers to fill out, which he did and left with the employer. He was told that there was no work for him at that time but at a subsequent date he would be notified when to come to work. Not receiving his notice he went to Edgewater on the twelfth of the following November and was put to work. He was hurt soon after and received compensation, pursuant to the New Jersey statute, from the insurance carrier in that State. Having been informed by some acquaintance that he was entitled to compensation under the New York act, he makes application now for compensation in this State. The question to be determined is, whether he is entitled to compensation under the New York act.

Claimant in person.

William H. Hotchkiss, for United States Fidelity and Guarantee Company and specially for the employer.

LYON, Commissioner.—If entitled to compensation under the New York act, the fact of claimant having accepted compensation in New Jersey would not debar him from receiving compensation here, provided the employer is given credit for the payments made in New Jersey. So held in *Gilbert v. Des Lauriers Column Mould Company*, 167 N. Y. 274. Whether the claimant is entitled to compensation under the law of this State or not, seems to hinge on the question whether his contract of employment was made in the State of New York. In the case of *Post v. Burger*, 216 N. Y. 544, the place of contract seems to have been the determining feature in the opinion of the Court of Appeals. It, therefore, remains for us to determine whether, under the proofs in this case, the claimant was hired in the State of New York. At the hearing I was strongly of the opinion that his contract of hiring took place on the dock at the foot of Ninety-fifth street on the eighteenth of October, subject, perhaps, to a rescission when he reached New Jersey, following a further examination, following our opinion reported in 9 State Department Reports, 340, appeal dismissed 221 N. Y. 574, but I think the fact that so long a time elapsed between the date when he was actually put to work at the New Jersey plant, militates against this theory.

There is no question but that the employer was well advised about the steps to be taken in order to make the hiring in this case a New Jersey contract and after very careful consideration of all the circumstances and proofs, I am of the opinion that it has succeeded in showing that the contract was made in New Jersey and not in the State of New York, and that, therefore, following the reasoning of the Court of Appeals in the case of *Post v. Burger* the claim for compensation in this State must be denied.

On the 11th day of June, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of PETER HARTMAN, for Compensation under the Workmen's Compensation Law, against AMERICAN METER COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. A-2267

(Decided June 13, 1918)

Injuries sustained by Peter Hartman while employed by the American Meter Company as a press hand in the company's plant at Albany, N. Y.

On December 12, 1917, Peter Hartman, the claimant, while employed by the American Meter Company as a press hand in the company's plant at Albany, N. Y., in the regular course of his employment was operating a toggle press, when three fingers of his left hand were caught between a holder and die of the press, crushing the fingers and necessitating the amputation of parts thereof. As a result, the grasping power of the hand is lost. *Held*, that the condition of the hand is equivalent to the loss of one-half of the use thereof, and that there is a permanent loss of one-half of the use of the said left hand. Award made.

The injuries to Peter Hartman were sustained on December 12, 1917. On January 15, 1918, a written agreement was entered into between the employer and injured employee for the payment of compensation. Thereafter this claim came on for hearing at Albany, N. Y., on February 27, 1918, at which time an award of compensation was made for a period of seventy weeks. At a further hearing held in this case at Albany, N. Y., on March 15, 1918, the former award was amended and an award made for 122 weeks, being for the permanent loss of one-half of the use of the left hand. Thereafter, this claim came on for hearing at Albany, N. Y., on May 7, 1918, at New York city on May 27, 1918, and June 10, 1918, and at Albany, N. Y., on June 13, 1918, on which latter date the award for the loss of one-half of the use of the left hand was confirmed.

Robert W. Bonynge, counsel to State Industrial Commission.

Amos H. Stephens (Thos. F. Hurley, of counsel), attorney for employer and insurance carrier.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On December 12, 1917, the day when Peter Hartman received his injuries, he resided at No. 88 Second avenue, Albany, N. Y., and was employed by American Meter Company engaged in the manufacture of gas meters with a plant or place of business located at No. 991 Broadway, Albany, N. Y. Peter Hartman was employed as a press hand in the press room at said plant.

On said date, Peter Hartman was working for his employer at his employer's plant and while engaged in the regular course of his employment, while operating a toggle press, three fingers of his left hand were caught between a holder and die of said machine, crushing the fingers and necessitating the amputation thereof, as follows: The little finger was amputated midway between the metacarpal phalangeal joint and the proximal joint; the ring finger was amputated proximal to the proximal joint; and the middle finger was amputated distal to the proximal joint. As a result of said injuries, the remaining portion of the little finger is useless, as is the remaining portion of the ring finger, and the remaining stump of the middle finger is of no functional use, and from a functional standpoint the grasping power of the hand is lost; the only power of grasping that remains is that which could be secured by holding objects with the index finger and thumb.

From the personal examination of the injured hand of the claimant herein by the commissioner presiding at the hearing on June 13, 1917, and taking into consideration all of the testimony and considering the injured hand from a surgical and functional view point, this Commission finds that the condition is equivalent

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to the loss of one-half of the use of the left hand, and that there is a permanent loss of one-half of the use of the left hand.

The average weekly wage of Peter Hartman was the sum of fifteen dollars and twelve cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but neither employer nor insurance carrier was prejudiced by such failure, if any.

Award of compensation is hereby made against American Meter Company, employer, and the Travelers' Insurance Company, insurance carrier, to Peter Hartman, injured employee, for the proportionate loss of use of the left hand for a period of 122 weeks being for the loss of one-half of the use of the left hand.

The failure, if any, of Peter Hartman to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that neither employer nor insurance carrier was prejudiced by such failure, if any.

In the Matter of the Claim of MARY MAHONEY, Widow, on Behalf of Herself and Infant Children, for Compensation under the Workmen's Compensation Law, for the Death of JAMES MAHONEY, against TROY GAS COMPANY, Employer; UTILITIES MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier

Death Case No. A-2168

(Decided June 14, 1918)

Injuries sustained by James Mahoney, resulting in his death, while employed as a laborer and gas pipe fitter by the Troy Gas Company at Troy, N. Y.

On January 17, 1918, James Mahoney, while employed as a laborer and gas pipe fitter by the Troy Gas Company, at Troy, N. Y., was in the regular course of his duties required to enter a cellar on River street, Troy, for the purpose of repairing a leak in a gas pipe. While in the said cellar Mahoney became exhausted from the effects of vitiated air and from the inhalation of illuminating gas, resulting in an undue muscular heart strain, and in a ruptured aneurism and in his death on the same day. Award made.

This claim came on for hearing before State Industrial Commission at Albany, N. Y., on February 20, 1918, March 6, 1918, March 22, 1918, and April 24, 1918; and at New York city on May 24, 1918, and on June 14, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Jeremiah F. Connor, attorney for employer and insurance carrier.

Abbott H. Jones, attorney for claimants.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact and award, as follows:

On January 17, 1918, the day when James Mahoney received the injuries which resulted in his death, he resided at No. 3203 Sixth avenue, Troy, N. Y., and was employed by Troy Gas Company, engaged in the manufacture of illuminating gas and electricity in the city of Troy, N. Y., and in connection with the manufacture of gas, in the repair of gas pipes in said city. James Mahoney was employed as a laborer and fitter, and his duties on January 17, 1918, required him to enter a cellar at No. 191 River street, Troy, N. Y., for the purpose of repairing a leak in a gas pipe.

On January 17, 1918, James Mahoney was working for his employer, and while engaged in the regular course of his employment at No. 191 River street, Troy, N. Y., while in the cellar, he became somewhat exhausted from the vitiation of the air caused by the escaping illuminating gas, which prevented him from getting the necessary amount of oxygen, which, together with the inhalation of the illuminating gas by James Mahoney, caused an undue muscular heart strain, resulting in a ruptured aneurism and in his death on the same day.

In the cellar where the accident happened there was enough gas to seriously embarrass a physician called to attend James

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Mahoney, although the door to the cellar had been open for ten minutes prior to the arrival of the physician.

The average weekly wage of James Mahoney was the sum of eighteen dollars and twenty-seven cents.

Due notice of death was given to the employer.

James Mahoney left him surviving Mary Mahoney, widow, aged forty-seven years, and Mary Mahoney, daughter, aged fifteen years, and George Mahoney, son, aged seventeen years, the claimants herein.

Award of compensation is hereby made against Troy Gas Company, employer, and Utilities Mutual Compensation Insurance Company, insurance carrier, to the widow and minor children of James Mahoney, deceased employee, as follows: To Mary Mahoney, widow, aged forty-seven years, at the rate of five dollars, forty-eight and one-tenth cents weekly during widowhood, with two years' compensation in one sum upon remarriage; to Mary Mahoney, daughter, aged fifteen years, and to George Mahoney, son, aged seventeen years, at the rate of one dollar, eighty-two and seven-tenths cents weekly to each until they shall respectively arrive at the age of eighteen years; and in case of the subsequent death of Mary Mahoney, widow, then the payments to the children shall be proportionately increased until each shall be receiving a sum equal to 15 per cent of the above mentioned average weekly wage.

In the Matter of the Claim of **TONY REPO**, for Compensation under the Workmen's Compensation Law, against **BARTLETT ALL-STEEL SCYTHE Co., Inc.**, Employer; **TRAVELERS' INSURANCE COMPANY**, Insurance Carrier

Case No. 2601-A

(Decided June 17, 1918)

Injuries sustained by Tony Repo while employed as an operator of a cutting machine by Bartlett All-Steel Scythe Co., Inc., at Salem, N. Y.

On October 25, 1917, Tony Repo, while employed as an operator of a cutting machine by the Bartlett All-Steel Scythe Co., Inc., of Salem, N. Y., a corporation manufacturing scythes, grass hooks and other

implements, with a plant located at Rexleigh, Washington county, N. Y., was placing a piece of steel in his machine, when his right hand was caught under the knife of said machine, with the result that several fingers had to be partially amputated, and there is a loss of muscular grasping power of the hand. *Held*, that the amputation of parts of the several fingers of the injured hand equals a loss of 70 per cent of the use of that hand. Award made.

This claim came on for hearing before State Industrial Commission at its office at Albany, N. Y., on March 27, 1918, April 10, 1918, May 22, 1918, and June 17, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

L. M. Layden, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On October 25, 1917, the day when Tony Repo received his injuries, he resided at Salem, N. Y., and was employed by Bartlett All-Steel Scythe Co., Inc., of Salem, N. Y., engaged in the manufacture of scythes, grass hooks and other implements, with a plant or place of business located at Rexleigh, Washington county, N. Y. Tony Repo was employed as an operator of a cutting machine.

On said date Tony Repo was working for his employer at his employer's plant, and while engaged in the regular course of his employment, while placing a piece of steel in the cutting machine, his right hand was caught under the knife of said machine, and he sustained injuries thereto resulting in the amputation of the first and second phalanges of the index finger; in the amputation of the first and second phalanges and a portion of the third phalanx of the middle finger; in the amputation of the first and second phalanges and a portion of the third phalanx

of the ring finger; and in the amputation of the first and second phalanges and a portion of the third phalanx of the little finger; the thumb remains fully supple but there is a loss of muscular grasping power of the hand.

From the personal examination of the injured hand of the claimant herein by the deputy commissioner presiding at the hearings, and taking into consideration all the testimony and considering the injured hand from a surgical and functional viewpoint, this Commission finds that the condition is equivalent to the loss of 70 per cent of the use of the right hand, and that there is a permanent loss of 70 per cent of the use of such hand.

The average weekly wage of Tony Repo was the sum of eighteen dollars and ninety-three cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but neither employer nor insurance carrier was prejudiced by such failure, if any.

Award of compensation is hereby made against Bartlett All-Steel Scythe Co., Inc., employer, and the Travelers' Insurance Company, insurance carrier, to Tony Repo, injured employee, for the proportionate loss of use of the right hand for a period of 170 weeks at the rate of twelve dollars and sixty-two cents per week, being for 70 per cent of the loss of use of the right hand.

The failure, if any, of Tony Repo to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that neither employer nor insurance carrier was prejudiced by such failure, if any.

In the Matter of the Claim of JEREMIAH FINLEY, for Compensation under the Workmen's Compensation Law, against EMPIRE CONSTRUCTION COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. 52204

(Decided June 17, 1918)

Injuries sustained by Jeremiah Finley while employed as a laborer by the Empire Construction Company in the city of New York.

On October 25, 1917, Jeremiah Finley was employed as a laborer by the Empire Construction Company, a corporation engaged in the building of subway and railway structures in New York city, and in the regular course of his employment, while a rail was being raised with a derrick from the street, a timber broke, causing the derrick upon which Finley stood to fall to the street, with the result that he was severely injured and was disabled from the date of the accident to February 15, 1918. Award made and case continued for further hearing.

This claim came on for hearing before State Industrial Commission at its office, No. 230 Fifth avenue, New York city, on January 21, 1918, January 28, 1918, February 4, 1918, February 15, 1918, and June 17, 1918.

Robert W. Bonyngne, counsel to State Industrial Commission.

Amos H. Stephens, attorney for insurance carrier.

Wesselman & Kraus, attorneys for employer.

John F. Burke (Louis Martin Levy, of counsel), attorneys for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision as follows:

On October 25, 1917, the day when Jeremiah Finley received his injuries, he resided at No. 304 West One Hundred and Forty-seventh street, New York city, and was employed by Empire Construction Company, engaged in the business of subway and railway construction, and in the construction of an elevated structure in connection with a subway and elevated system at South One Hundred and Sixty-first street and River avenue, New York city. Jeremiah Finley was employed as a laborer.

On said date, Jeremiah Finley was working for his employer at South One Hundred and Sixty-first street and River avenue, New York city, and while engaged in the regular course of his employment, while a rail was being raised with a derrick from the street a timber broke, causing the derrick to fall to the street below, carrying Jeremiah Finley with it, and he thereby sustained injuries consisting of a badly sprained back, hips, left shoulder and right thumb, together with an injury over the right eye necessitating three stitches, and a cut under the chin necessitating one stitch, and his right hand was cut in multiple places, and as a result of said injuries he was disabled from the date of said accident to February 15, 1918, and on that date he was still disabled.

The average weekly wage of Jeremiah Finley was the sum of fourteen dollars and forty-two cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but neither employer nor insurance carrier was prejudiced by such failure.

Prior to said accident, the employer company had secured compensation to its employees, including Jeremiah Finley, as required by section 50 of the Workmen's Compensation Law; and on October 25, 1917, and at the time of said accident the Travelers' Insurance Company was the insurance carrier of the Empire Construction Company, the employer herein; and said contract of insurance, which covered the employees of the employer herein, including Jeremiah Finley, was not procured through fraud or misrepresentations by the employer or on its behalf.

Award of compensation is hereby made against the Empire Construction Company, employer, and the Travelers' Insurance

Company, insurance carrier, to Jeremiah Finley, injured employee, for a period of sixteen weeks from October 25, 1917, to February 15, 1918, and this claim is hereby continued for further hearing.

The failure, if any, to give written notice of injury to the employer within ten days after disability is hereby excused on the ground that neither employer nor insurance carrier was prejudiced by such failure, if any.

The opinion of Commissioner Henry D. Sayer in the cases of Fagnani v. Empire Construction Co. & Travelers' Insurance Co., and O'Shaughnessy v. Empire Construction Co. & Travelers' Insurance Co., as modified by resolution adopted on March 14, 1918, is adopted as the opinion of this Commission.

The testimony taken in the Fagnani and O'Shaughnessy cases above mentioned is to be made part of the record on appeal in this case.

In the Matter of the Claim of EMMA JACKSON, Widow, for Compensation under the Workmen's Compensation Law, for the Death of GRANDISON JACKSON, against NEW YORK CONSOLIDATED RAILROAD COMPANY, Employer and Self-Insurer

Death Case No. 57384

(Decided July 3, 1918)

Injuries sustained by Grandison Jackson, resulting in his death, while employed as a porter by the New York Consolidated Railroad Company at Brooklyn, N. Y.

On November 26, 1916, Grandison Jackson, while employed as a train porter by the New York Consolidated Railroad Company, and while in the regular course of his employment, fell from a platform to a track and was severely injured. As he was then seventy years of age and was suffering from kidney disease, *held*, that the fall hastened the progress of his disease, which resulted in his death on December 3, 1917. Award made and funeral expenses provided for.

The injuries which resulted in the death of Grandison Jackson were sustained on November 26, 1916. Thereafter, a written agreement was entered into between the employer and claimant

on January 16, 1917, for the payment of compensation on the basis of the average weekly wage of \$10.38. Said agreement was duly approved by this Commission on January 16, 1917. Hearing on the claim for disability was held on May 15, 1917, at which time claimant was awarded compensation for the period from April 7, 1917, to May 5, 1917. Thereafter, hearings were duly held in both disability and death claims herein on January 23, 1918, and April 22, 1918, on which latter date an award of compensation was made in the disability claim for the period from November 26, 1916, to December 3, 1917, the date of death, in the sum of \$352.92 less \$145.28 which had already been paid, leaving a balance of \$207.64. An award was also made to the widow on said date on account of the death of Grandison Jackson. Thereafter, hearings were held on May 20, 1918, June 3, 1918, and July 3, 1918, on which latter date the award to the widow previously made was confirmed.

Robert W. Bonynge, counsel to State Industrial Commission.

George D. Yeomans, attorney for employer and self-insurer.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On November 26, 1916, the day when Grandison Jackson received the injuries which later resulted in his death, he resided at No. 242 Classon avenue, Brooklyn, N. Y., and was employed by New York Consolidated Railroad Company engaged in the operation of a railroad in the borough of Brooklyn, city of New York. Grandison Jackson was employed as a porter in connection with said railroad.

On November 26, 1916, Grandison Jackson was working for his employer, and while engaged in the regular course of his employment, he fell from a platform to a track and sustained a comminuted fracture of the left tibia and fibula. At the time of

said accident, Grandison Jackson was seventy years of age and was apparently suffering from kidney disease without any local or constitutional manifestations thereof. The injury thus received reduced his resisting power, accelerated the kidney disease and decompensated his cardiac condition, and was a contributing factor in shortening his life, and causing his death on December 3, 1917. As a result of said injuries he was also disabled from the date of said accident to the date of his death.

The average weekly wage of Grandison Jackson was the sum of ten dollars and thirty-eight cents.

Written notice of injury was not given to the employer within ten days after disability, but the employer and self-insurer was not prejudiced by such failure. It does not appear whether written notice of death was given to the employer within thirty days thereafter, but the employer and self-insurer was not prejudiced by such failure, if any; on the other hand, objection to the failure to give such notice not having been raised before the Commission at the hearings on this claim is deemed to have been waived by the employer and self-insurer.

Grandison Jackson left him surviving Emma Jackson, widow, aged fifty-five years, the claimant herein.

Award of compensation is hereby made against New York Consolidated Railroad Company, employer and self-insurer, to Emma Jackson, widow, aged fifty-five years, at the rate of \$3.11 weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Emma Jackson in the sum of \$100 on account of the funeral expenses of Grandison Jackson, deceased.

The failure to give written notice of injury to the employer within ten days after disability is hereby excused on the ground that the employer and self-insurer was not prejudiced by such failure. The failure, if any, to give written notice of death to the employer within thirty days thereafter is hereby excused on the ground that the employer and self-insurer was not prejudiced by such failure, if any; on the other hand the failure to give such notice is deemed to have been waived by the employer and self-insurer.

In the Matter of the Claim of MARY BATES, Widow, on Behalf of Herself and Infant Children, for Compensation under the Workmen's Compensation Law, for the Death of STEPHEN BATES, against PLATTSBURGH GAS AND ELECTRIC COMPANY, Employer; THE TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Death Claim No. 104-A

(Decided July 15, 1918)

Injuries sustained by Stephen Bates, resulting in his death, while employed as a fireman by the Plattsburgh Gas and Electric Company at Plattsburgh, N. Y.

On July 24, 1917, Stephen Bates, while employed as a fireman in the boiler room of the plant of the Plattsburgh Gas and Electric Company at Plattsburgh, N. Y., and while in the regular course of his employment, was prostrated by the heat of the boiler room, resulting in his death on the same day. Awards made and funeral expenses provided for.

This claim came on for hearing before the State Industrial Commission on October 17, 1917, at Plattsburgh, N. Y.; on October 20, 1917, at New York city; and at Plattsburgh, N. Y. on November 23, 1917, and July 15, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

Victor T. Boire, attorney for claimants.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On July 24, 1917, the day when Stephen Bates received the injuries which resulted in his death, he resided at No. 29 Main Mill street, Plattsburgh, N. Y., and was employed by Plattsburgh Gas and Electric Company engaged in the manufacture of gas, electric light and power, with a plant or place of business located

at Saranac street, Plattsburgh, N. Y. Stephen Bates was employed as a fireman in the boiler room of said plant.

On July 24, 1917, Stephen Bates was working for his employer, and while engaged in the regular course of his employment as a fireman in the boiler room in which the temperature was extremely hot, he was prostrated by the heat, which caused his death on the same day.

The average weekly wage of Stephen Bates was the sum of twenty dollars and seventy-seven cents.

Written notice of death was not given to the employer within thirty days thereafter, but neither employer nor insurance carrier was prejudiced by such failure. On the other hand, objection to the failure to give such notice not having been raised before this Commission at the hearings of this claim is deemed to have been waived by both the employer and insurance carrier.

Stephen Bates left him surviving Mary Bates, widow, aged thirty-four years; Truman Bates, son, aged fifteen years; Charles Bates, son, aged thirteen years; Dorothy Bates, daughter, aged eleven years; Gertrude Bates, daughter, aged six years; Evaline Bates, daughter, aged five years; and Helena Bates, daughter, aged five years, the claimants herein.

Award of compensation is hereby made against Plattsburgh Gas and Electric Company, employer, and Travelers' Insurance Company, insurance carrier, to the widow and minor children of Stephen Bates, deceased employee, as follows: To Mary Bates, widow, aged thirty-four years, at the rate of six dollars and twenty-three cents weekly during widowhood, with two years' compensation in one sum upon remarriage; to Truman Bates, son, aged fifteen years, to Charles Bates, son, aged thirteen years, to Dorothy Bates, daughter, aged eleven years, to Gertrude Bates, daughter, six years, to Evaline Bates, aged five years, and to Helena Bates, daughter, aged five years, at the rate of one dollar and twenty-seven cents weekly to each until they shall respectively arrive at the age of eighteen years; and in case of the subsequent death of Mary Bates, widow, then the payments to the children shall be proportionately increased until each child shall be receiv-

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ing a sum equal to 15 per cent of the above mentioned average weekly wage, but in no event shall the total amount payable exceed 66 $\frac{2}{3}$ per cent of such wages; and if the payments to the widow shall otherwise cease, or if the payments to any child cease by operation of law or otherwise, then the payments to each of the remaining children shall be increased to 10 per cent of said average weekly wage; and to Eugene Brown & Son in the sum of ninety-eight dollars on account of the funeral expenses of Stephen Bates, deceased.

The failure to give written notice of death to the employer within thirty days thereafter is hereby excused on the ground that neither employer nor insurance carrier was prejudiced by such failure. On the other hand, the failure to give such notice is deemed to have been waived by both the employer and the insurance carrier.

In the Matter of the Claim of D. J. BOICE, for Compensation under the Workmen's Compensation Law, against PATENT SPECIALTY SUPPLY COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. 2267

(Decided July 24, 1918)

Circumstances justifying presumption of accident.

The question herein involved is as to whether the evidence on the hearing had in this case justifies the presumption that there was any accident. The evidence adduced at a rehearing in this case as to this particular question on July 2, 1918, and claimant having sworn that there was an accident, that he duly served notice thereof to the representative of the employer and it appearing that such notice is admitted and that the employer did not furnish the claimant with proper medical attention, or investigate as to the occurrence of an accident, justified the presumption that there was an accident; that the evidence sustained this presumption and that, therefore, an award should be made, the exact amount of the award to be determined at a subsequent hearing.

LYNCH, Commissioner.— Under date of May 21, 1918, assistant counsel Rayher wrote an opinion in this case saying among other things: "I can see no reason for denying an award to the claimant, especially in view of his testimony and the statement of Dr. Grey, dated August 23, 1917."

Mr. Rayher then suggested that another hearing should be held and the people who had made affidavits called in for examination and cross-examined.

This hearing took place at Shushan, N. Y., on Tuesday, July 2, 1918, and the evidence sustained Mr. Rayher's opinion.

At the original hearing claimant testified that shortly after a piece of tin flew in his eyes he went into the business office and notified the bookkeeper, Doddin, and that about a week later he notified the business manager, Lovejoy.

On the later hearing on July second, these witnesses corroborated the claimant in his statement of notification to them of the accident.

It appears that instead of notifying the insurance carrier, Lovejoy sent claimant to the village doctor, who was not an eye specialist, and who therefore was unable to verify or disprove the claim that there was a piece of tin in claimant's eye.

Claimant further says that he knew very little about the Compensation Law. That Lovejoy must have known about the Compensation Law is apparent, for the concern for which he was business manager has a compensation insurance policy with the Travelers' Insurance Company. Immediately upon claimant reporting his accident to Lovejoy, the latter should have sent him to an eye specialist or notified the carrier company of the accident and enabled it to do this, and the question of whether a piece of tin was in claimant's eye could then have been investigated and definitely determined.

There is also considerable testimony as to the claimant wearing colored glasses, but the witnesses contradict themselves more or less as to whether it was before the accident or after the accident, and none of them pretends to know as to whether one eye was weak or both eyes were weak or whether the eye into

which the piece of tin entered was a perfect eye prior to the accident.

It does not seem to me that it is in any way important in view of the testimony in this case, whether claimant wore glasses prior to the accident or not. The important thing is that he alleges an accident; that within the required time he notified the bookkeeper and the business manager; that the bookkeeper and business manager admit this and that thereafter they did not furnish, as was their duty, this claimant with proper medical attention, or take steps to bring about an investigation, if they doubted an accident occurred.

In my opinion, the circumstances justified the presumption that there was an accident, that the evidence sustains this presumption and that therefore an award should be made.

The exact amount due claimant by reason of the loss of time, or decreased earning capacity, to be determined at a subsequent hearing.

On the 24th day of July, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of CHARLES FISCHER, for Compensation under the Workmen's Compensation Law, against GENESEE CONSTRUCTION COMPANY, Employer; STATE INSURANCE FUND, Insurance Carrier

Case No. 13794

(Decided July 24, 1918)

Authority of the Commission to change an award made upon the recommendation of a deputy commissioner, and approved pro forma by the Commission, where the Commission is convinced that the award is erroneous.

Where claimant's hand is injured and the loss of vision in one of his eyes is claimed as a result thereof some causal relation between the accident and the vision must be established.

Policy followed by Commission in regard to appeals.

The claimant herein filed a claim alleging that on February 22, 1917, while employed by the Genesee Construction Company, cutting granite,

the hammer he was using slipped off the chisel and hit the top of his left hand, bruising the hand, which became swollen and in which pus gathered. An award was made by the deputy who heard the case, based on certain testimony tending to show that the hand and arm became involved, and that poison from the suppuration got into claimant's blood with the result that his right eye was affected and he lost the vision thereof. On the other hand, however, one of the physicians who examined the claimant within a little over a month after the accident found no external signs of any injury in the hand. It is declared in behalf of the claimant that the deputy commissioner who heard the case having recommended an award, under which \$400 has been already paid the claimant, and the recommendation of the deputy commissioner having been approved *pro forma* by the Commission, the Commission is entirely without jurisdiction to change this award, even though it is convinced that the same is erroneous. In this case a rehearing was asked for by the insurance carrier. Claimant, however, alleges that although it might be the right of an injured person to have a rehearing, that the statute being a humane one does not cover an application for a rehearing in behalf of employers and insurance carriers. *Held*, that it is a startling proposition that the statute should have for its scheme the right of one party to the controversy to have a manifest error corrected while denying it to the other, and that the same ruling should be adopted with reference to the insurance carrier that would be proper in case of the claimant. The case disclosed a sharp conflict of medical testimony. *Held*, that to believe that the loss of vision in the eye resulted from the blow on the hand would be to revive the old logical fallacy *post hoc ergo propter hoc*, and that an injury which did not cause any local infection could not have caused such a condition in a remote part of the body as was necessary to cause the loss of the use of the eye. The awards of the Commission must be made not on what might possibly have happened but on a finding that it did happen. If the award is to stand at all it must be upon a valid finding that the blow to the hand had caused such a condition and there is no such finding. No causal relation between the injury to the claimant's hand and his loss of vision in his right eye has been established and the award for loss of the use of the right eye should be rescinded and the case closed.

The setting aside of the award made herein and the closing of the case is all the more readily ordered by the Commission because the claimant's attorney has expressed his readiness to take the case up on appeal in case the Commission disturbs the award already made. It is usually found that where an award is denied to the claimant the denial becomes final, because the claimant is unable to prosecute an appeal, whereas if an award is made in behalf of the claimant which the insurance carrier deems to be wrong it is pretty sure to be tested out on appeal because the insurance carriers have the facilities for properly reviewing the decisions of the Commission. The present case, however, is exactly the reverse. The claimant has an attorney who is perfectly ready and willing to test

the law by an appeal in this case, whereas the insurance carrier, being the State fund, has no right of appeal, and an award if made must stand and be paid, however erroneous it may be.

The claimant filed his claim for compensation in this case on March 12, 1917, in which he gives the date of his accident as February 22, 1917, and gave the following answers to questions: "Q. How did accident happen? A. Was cutting concrete, hammer slipped off chisel and hit top of left hand. Q. State fully nature of injury? A. Bruised left hand. Swollen and pus is gathering. Q. Have you returned to work? A. No. Q. If not, when will you be able to return? A. Probably about a week. Q. Name of attending physician? A. Dr. W. C. Schuhart."

An award having been made on the recommendation of the deputy who heard the case, for the loss of the use of right eye, the case comes on for review at the request of the insurance carrier. Dr. W. C. Schuhart, the first attending physician, is dead.

C. D. Kiehel, for claimant.

W. A. Hermann, for State Fund.

LYON, Commissioner.—It is stated by the attorney for the claimant that \$400 has been paid the claimant. This is undoubtedly more than enough to pay the claimant for his disability growing directly out of the hand injury, for Dr. Schnell, who later treated the claimant, testified that he examined the claimant on March 26, 1917, only a little over a month after the accident, and found no external signs of any injury to the hand. It is somewhat startling to a person not skilled in medicine to be told that a blow upon the hand which had so completely healed as to show no external evidences in a month, should be the cause of total blindness, yet such is the claim in this case and an award has been made on that theory and the right of the Commission to review this award is challenged by the attorney for the claimant on the sole ground that the recommendation of the deputy

having been approved *pro forma*, the Commission is entirely without jurisdiction to change the award, even though it is convinced that the same is erroneous. In *Beckman v. Oelerich*, 174 App. Div. 353, an award had been denied the claimant. Upon application of the claimant for a rehearing the Commission opened the case, received further testimony and made an award. The insurance carrier in that case raised the same question as that presented by the claimant's attorney in this case, namely, that the award having once been made, the Commission was without jurisdiction to disturb it and that the claimant's only remedy was by way of appeal, relying upon sections 22 and 23 of the law which provide in section 22 that the Commission may vary an award where a change in conditions has taken place, and in section 23 that the award shall be final, unless reversed on appeal. The court, however, construed section 74 of the law, which gives the Commission continuing power and jurisdiction over all cases and the right to make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just otherwise and overruled the objection of the insurance carrier, saying: "Apparently, upon the application for a rehearing, facts were brought to the attention of the Commission indicating that its decision had been made without full knowledge of the facts, making it questionable in the judgment of the Commissioners whether the claim had been justly disposed of. Possessed of this uncertainty the Commission was not only within its rights, but in the discharge of a positive duty when it granted a rehearing, and when later confronted by additional evidence, and believing its former decision to be incorrect, it promptly corrected it. The right exercised by the Commission was the right often exercised by courts of record under like circumstances even after the determination of the case on appeal."

The attorney for the claimant apparently was familiar with this case for in his memorandum opposing the right of the Commission to review the award in this case, he mentioned the *Beckman* case and then in commenting upon it says: "The construction of the statute was based upon the theory that the Act was

enacted for humane purposes and that for the benefit of the employee a liberal construction had to be given in view of such purpose. The opening of the case, having been asked for by the employee, the theory of the court was undoubtedly correct. But where such application is made by the insurance carrier and against the employee, the reason for the rule fails."

And again: "The liberal construction invoked by the courts does not obtain in favor of the employer and insurance carrier because it is contrary to the scheme and scope of the statute to establish such an interpretation."

To me this is a startling statement, that a statute should have for its scheme the right of one party to a controversy to have a manifest error corrected while denying it to the other, and I do not for a moment believe that a proper interpretation of the statute would warrant any such conclusion. In the recent case of *Prendergast v. Berrian*, 184 App. Div. 240, the court said: "It has been the practice of the Commission and of the courts to administer the provisions of the Compensation Law in a liberal spirit and in disregard of formal and technical rules of procedure. No good reason suggests itself why the treatment of the claimant should be liberal and that of employers and carriers should be otherwise."

Certainly no reason in this case suggests itself to my mind why a different ruling should be adopted with reference to the insurance carrier from that which would be proper in case of the claimant. All the more so, since the insurance carrier is the State Fund, which has no right of appeal, so that the error if not corrected by this Commission, must remain entirely uncorrected. I think the attorney for the claimant inferentially admits that the claimant's case for an award for the loss of an eye is without real substance, for in a somewhat vigorous letter of protest against a re-consideration of the case by the Commission, accompanied by a rather prolix memorandum, he nowhere intimates that the claimant ought to succeed on the merits of his claim, but bases his whole protest and argument on the proposition that though the Commission might very properly correct an error if it were against a

claimant, it cannot correct an equally obvious error if it should turn out to be against an insurance carrier. Turning now to the merits of the claimant's claim, I am unable after a careful study of the whole record, to find any convincing evidence in the case that the claimant's loss of vision was due to the comparatively slight injury to his hand. As already stated, Dr. Schnell, who examined him about a month after his accident, found no evidence of any external injury to the hand. He is, however, quite positive in his opinion that the blindness is due to the hand accident, but bases his opinion apparently upon a statement made by Dr. Schuhart, now deceased, that the claimant had septicaemia of the left hand and arm. This statement of Dr. Schuhart was made, as its date shows, on August 8, 1917, or nearly six months after the injury to the hand. The award as it stands apparently will have to rest largely on the theory that because the blindness followed an accident to the hand, it was caused by it, reviving the old logical fallacy *post hoc ergo propter hoc*.

I am unable to bring my mind to believe that an injury which did not cause any local infection could have set up a septicaemia causing so serious consequences in a portion of the body remote from the site of the injury. Turning now to the expert medical testimony, Dr. Schnell is of the opinion that a connection has been established between the blindness and the accident to the hand, but it should be noted that he bases his opinion upon the statement made by Dr. Schuhart, that a septicaemia set in. Also, that he is the expert called on behalf of the claimant. Dr. Gelser was asked his opinion and among other things, says: "Apparently this man had some severe inflammation in the left hand and arm which followed the day after a severe blow on the hand with a hammer. This apparently did not result in any pus formation in the hand, arm or axilla, but there was simply a condition of severe pain, swelling, tenderness and redness which persisted in the arm for three or four weeks without breaking down or forming pus. I think it is quite possible that in this severely inflamed arm there might have been a small focus of infection which got into the blood stream and was carried to the iris."

This it seems to me is not sufficient to warrant us in making an award. Our awards must be made not on what *possibly might* have happened, but on a finding that it *did happen*. This award cannot certainly stand on a finding made by this Commission that it is *possible* that the blow to the hand caused septicaemia which was carried to the eye. If the award is to stand at all, it must be on a flat finding that the blow to the hand *did* cause such a condition. Dr. Williams, the examining physician for the State Fund, is very positive that no causal connection has been traced between the hand injury and the blindness of the claimant's eye. Dr. Lewy, our chief medical examiner, states: "If within two weeks after the alleged injury an acute severe iritis developed, and if the infection following the hand was severe enough to consider it septicaemia, then the dislodgment of some septic material from the site of the injured septic focus could have lodged into the eye through the circulation, causing the condition which resulted in blindness of the right eye (unless the claimant had all the evidence of a general septicaemia), I would be inclined to think that the iritis was due to other predisposing constitutional causes."

Here again the statement is that the septic focus *could* have lodged into the eye through the circulation and not a statement that it *did*. In fact it is his opinion on the whole case that it did not. Dr. Torok, an eminent eye specialist, has examined the case and states: "It is to my knowledge and according to my experience, and also the experience of all authorities in ophthalmology, an extremely rare occurrence that a septicaemia, which means an acute and highly virulent infection, should cause an iritis. * * * According to our present knowledge iritis is due to either constitutional causes or to some chronic infectuous focus in the body, where the virulence of the bacteria has been lowered, such as an abscess of the teeth, sinuses, tonsils, prostate gland, etc. Such a focus (abscess of teeth) has been found in Mr. Fisher's body and it is therefore in my opinion most probable, that the iritis is due to this condition."

In my opinion a causal relation between the injury to the claim-

ant's hand and his loss of vision in his right eye has not been established and I recommend that the award for loss of the use of his right eye be rescinded and the case closed. I advise this all the more readily because the claimant's attorney has expressed his readiness to take the case up on appeal in case the Commission disturbs the award already made. We usually find that where an award is denied to the claimant, the denial becomes final because the claimant is unable to prosecute an appeal, whereas if an award is made in favor of a claimant which an insurance carrier deems to be wrong, it is pretty sure to be tested out on appeal, because insurance carriers have the facilities for properly reviewing our decisions. The present case, however, is exactly the reverse. The claimant has an attorney who is perfectly ready and willing to test the law by an appeal in this case, whereas the insurance carrier, being the State Fund, has no right of appeal and an award, if made, must stand and be paid however erroneous it may be.

On the 24th day of July, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of FRANK LAVANCHA, for Compensation under the Workmen's Compensation Law, against KIMBALL & SON, Employer; MARYLAND CASUALTY COMPANY, Insurance Carrier

Claim No. S-4257

(Decided July 25, 1918)

Injuries sustained by Frank Lavancha while employed by Kimball & Son as a foreman in a veneer mill and saw mill at Harrisville, N. Y.

On April 16, 1918, while Frank Lavancha was employed by Kimball & Son as a foreman in the operation of a veneer mill and saw mill and in lumbering at Harrisville, N. Y., he was in the regular course of his employment as such foreman fulfilling his duties as a sawyer and filer, and while thus engaged at the plant of his employer was injured by hot tea being blown into his face and eyes by the explosion of a can contain-

ing boiling tea, and sustained severe injuries. Many of the employees had the custom of eating their lunches on the premises and each man brought a pail containing tea and heated it upon a stove at the plant. The cans were placed on the stove a few minutes before twelve. This habit was continued with the knowledge and acquiescence of the employer. While the claimant was putting his tea pail on the stove the pail of a fellow employee there being heated exploded and the cover of the pail flew off and the steam and hot tea blew into his face and eyes. Award made.

This claim came on for hearing before State Industrial Commission at Syracuse, N. Y., on July 2, 1918, and at Watertown, N. Y., on July 25, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Fitsimmons & Archibald, attorneys for employer and insurance carrier.

Fred L. Smith, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On April 16, 1918, the day when Frank Lavancha received his injuries, he resided at Harrisville, N. Y., and was employed by Kimball & Son engaged in the operation of a veneer mill and saw mill, and in lumbering at Harrisville, N. Y. Frank Lavancha was employed at said plant as a foreman and his duties consisted of being a sawyer and filer.

On said date, Frank Lavancha was working for his employer at his employer's plant, and while engaged in the regular course of his employment, the cover of a can, containing boiling tea, blew off, and the tea was blown into his face and eyes, and he sustained injuries consisting of burned face and eyes, which disabled him from the date of said accident to June 10, 1918.

The accident to Frank Lavancha occurred shortly after 12 noon, and immediately after he had shut the mill down for the noon recess. It was the prevailing custom among the employees at

this plant to eat their lunches on the premises and for this purpose the men never took a full hour, the time for lunch running from half an hour to fifty minutes. It was likewise customary for the employees to place upon a stove, in said plant, pails or cans containing tea for the purpose of having hot tea at the noon time meal. Usually the cans were placed on the stove a few minutes before 12. The heating of tea and the eating of lunch on the premises was done with the knowledge and acquiescence of the employer. Frank Lavancha, after shutting the mill down at 12 o'clock, took his pail containing tea and was about to place the same on a stove upon which rested the pail of a fellow-employee, which was being heated, when the latter pail exploded in that the cover of the pail blew off and the steam and hot tea from the pail blew into his face and eyes.

The average weekly wage of Frank Lavancha was the sum of seventeen dollars and thirty-one cents.

It does not appear whether written notice of injury was given to the employer within the time prescribed by section 18 of the Compensation Law, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given. On the other hand, objection to the failure to give such notice not having been raised before this Commission at the hearings of this claim is deemed to have been waived by both the employer and insurance carrier.

Award of compensation is hereby made against Kimball & Son, employer, and Maryland Casualty Company, insurance carrier, to Frank Lavancha, injured employee, for a period of seven and four-sixth weeks from April 16, 1918, to June 10, 1918, at the rate of eleven dollars and fifty-four cents per week.

It is presumed under section 21 of the Compensation Law that sufficient notice of injury was given to the employer. On the other hand, the failure to give such notice is deemed to have been waived by both the employer and the insurance carrier.

In the Matter of the Claim of ELLEN WHALEN, Widow, on Behalf of Herself and Infant Children, for Compensation under the Workmen's Compensation Law, for the Death of WILLIAM C. WHALEN, against STANWOOD TOWING COMPANY, Employer; NEW AMSTERDAM CASUALTY COMPANY, Insurance Carrier

Death Case No. 77165

(Decided August 12, 1918)

Injuries sustained by William C. Whalen, resulting in his death, while employed by the Stanwood Towing Company as a tug boat captain.

On January 20, 1918, William C. Whalen, while employed as a captain of the tug *William Rheinhardt* by the Stanwood Towing Company of New York city, a corporation engaged in the operation of vessels, was called to the office of his employer at No. 17 State street in that city, where he was paid his wages and told that he was discharged. That was about eleven o'clock in the morning. He returned to his boat apparently to secure his clothes and procure his license, as a master of a vessel is allowed but twenty-four hours by law on a new boat without his license in his possession. About 1 P. M. of that day he lunched on the boat with the engineer, who was the last person to see him alive. On May 3, 1918, his body was found floating in the East river near the place where the *William Rheinhardt* had been tied on said January 20, 1918. Held, that Mr. Whalen's death was in the regular course of his employment and the reasonable inference is that he fell from his boat into the water or fell into the water while attempting to leave his boat. Award made and funeral expenses provided for.

The accidental death of William C. Whalen occurred on January 20, 1918, subsequent to the amendment by Congress of sections 24 and 256 of the Judicial Code saving to claimants the rights and remedies under the Workmen's Compensation Law of any State. Hearings were duly held at New York city on June 3, 1918, July 31, 1918, and August 12, 1918.

Robert W. Bonyng, counsel to State Industrial Commission.

Frederick Mellor, attorney for employer and insurance carrier.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On January 20, 1918, the day when William C. Whalen received the injuries which resulted in his death, he resided at No. 500 West Thirty-fifth street, New York city, and was employed by Stanwood Towing Company of No. 17 State street, New York city, engaged in the operation of vessels. William C. Whalen was employed as the master or captain of a tug known as *William Rheinhardt*.

On January 20, 1918, William C. Whalen was working for his employer as captain of the tug *William Rheinhardt*, which was tied to pier 11, East river, New York city, and while engaged in the regular course of his employment, was accidentally drowned.

There is no direct proof of an accident causing Mr. Whalen's death, and the award and findings herein are based upon the reasonable inferences to be drawn from the facts. On January 20, 1918, William C. Whalen arrived at the tug *William Rheinhardt* at about 9:30 A. M. Shortly thereafter he left the boat to secure the services of a cook and returned to the boat with the cook. He remained on the boat, and in charge thereof, until between 10 and 11 A. M., when in response to a telephone message he went to the office of his employer at No. 17 State street, New York city, where he was paid his wages and told that he was discharged. He returned to the boat apparently to obtain his clothes and to procure his license — it being customary for a master of a vessel to remove his license from a boat at the termination of his employment thereon, as the law allowed a master of a vessel but twenty-four hours on a new boat without his license in his possession. He was last seen alive on the boat between 1 and 1:30 P. M., having taken lunch thereon with the engineer, who was the last person known to have seen him alive. On May 3, 1918, his body was found floating in the East river between piers 11 and 12, and near the place where the tug *William Rheinhardt* had been tied on January 20, 1918.

The reasonable inference is that William C. Whalen fell from:

his boat into the water, or he fell into the water while attempting to leave his boat.

The average weekly wage of William C. Whalen was the sum of twenty-three dollars and eight cents.

Written notice of death was not given to the employer within thirty days thereafter, but sufficient reason existed why such notice could not have been given as the claimant herein did not know of the accidental death until the finding of the body. On the other hand, objection to the failure to give such notice not having been raised before the Commission at the hearings of this claim is deemed to have been waived by both the employer and the insurance carrier.

William C. Whalen left him surviving Ellen Whalen, widow, aged twenty-eight years; Loretta Whalen, daughter, aged seven years; Eleanor Whalen, daughter, aged five years; and William Whalen, son, aged three years, the claimants herein.

Award of compensation is hereby made against Stanwood Towing Company, employer, and New Amsterdam Casualty Company, insurance carrier, to the widow and minor children of William C. Whalen, deceased employee, as follows: To Ellen Whalen, widow, aged twenty-eight years, at the rate of \$6.924 weekly, during widowhood, with two years' compensation in one sum upon remarriage; to Loretta Whalen, daughter, aged seven years, to Eleanor Whalen, daughter, aged five years, and to William Whalen, son, aged three years, at the rate of \$2.308 to each until they shall respectively arrive at the age of eighteen years; and in case of the subsequent death of Ellen Whalen, widow, then the payments to the children shall be proportionately increased until each shall be receiving a sum equal to 15 per cent of the above mentioned average weekly wage; and to Thomas P. Howley in the sum of \$100 on account of the funeral expenses of William C. Whalen, deceased.

The failure to give written notice of death to the employer within thirty days thereafter is hereby excused on the ground that sufficient reason existed why such notice could not be given. On the other hand the failure to give such notice is deemed to have been waived by both the employer and the insurance carrier.

In the Matter of the Claim of GEORGE B. KULP, for Compensation under the Workmen's Compensation Law, against JOSEPH F. STABELL Co., Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., Insurance Carrier

Case No. B-3478

(Decided August 16, 1918)

Injuries sustained by George B. Kulp while employed as a foreman on excavation work by Joseph F. Stabell Company in the city of Buffalo, N. Y.

On December 30, 1917, George B. Kulp, while employed as a foreman by Joseph F. Stabell Company at Buffalo, N. Y., and while engaged in the regular course of his employment, was endeavoring to thaw out a gasoline pump when the gasoline exploded, inflicting severe injuries and serious facial disfigurement. The employer and the claimant reached an agreement as to compensation for his injuries and several payments on account thereof were made. This being a case involving serious facial disfigurement it is within the provisions of subdivision 3 of section 15 of the Compensation Law and subsequently came on for a hearing before the Commission as to that phase of the case. Award made.

The injuries to George B. Kulp were sustained on December 30, 1917. On January 25, 1918, a written agreement was entered into between employer and injured employee for the payment of compensation. Said agreement was duly approved by this Commission on February 8, 1918, and in accordance therewith, payments of compensation have been made to the injured employee. This claim came on for hearing on June 7, 1918, June 21, 1918, and August 16, 1918, at Buffalo, N. Y., in respect to the serious facial disfigurement sustained by claimant, and an award of \$2,000 was made on June 21, 1918, and reaffirmed on August 16, 1918, under subdivision 3 of section 15 of the Workmen's Compensation Law, which provides that in case of an injury resulting in serious facial or head disfigurement the Commission may, in its discretion, make an award of compensation as it may deem proper and equitable in view of the nature of the disfigurement.

Robert W. Bonyng, counsel to State Industrial Commission.

William Butler, attorney for employer and insurance carrier.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On December 30, 1917, the day when George B. Kulp received the injuries which resulted in serious facial disfigurement, he resided at No. 163 West avenue, Buffalo, N. Y., and was employed by Joseph F. Stabell Company, engaged in sewer construction and excavation work at Swan and Jefferson streets, Buffalo, N. Y. George B. Kulp was employed as foreman in connection with said work.

On December 30, 1917, George B. Kulp was working for his employer at the location above mentioned, and while engaged in the regular course of his employment, while attempting to start a gasoline pump, and in thawing the same out, the gasoline exploded and his clothes caught fire and his face, neck and chest were burned, which injuries resulted in disabling him for a period of eight weeks and one day, and likewise resulted in serious facial disfigurement.

The nature of said disfigurement is as follows: On the forehead there is a hyperemic area 4 inches by $2\frac{1}{2}$ inches in the form of a cross, directly in the median line of the frontal bone from the hair line above to the eyebrows below. On either side are other areas, less prominent but plainly perceptible, from temple to temple. This discoloration is due to hyperemia and is not pigmented. Each eyebrow has been involved, with some cicatric tissue above each eye. The disfigurement is produced by the discoloration, which is plain and prominent. He is only burned below the forehead. His hat protected the forehead to such an extent that the skin is normally white outside of the

hyperemic area which has resulted from his burns. The discoloration increases as the man gets excited, increasing the blood supply locally.

The average weekly wage of George B. Kulp was the sum of twenty-five dollars and ninety-six cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given. Both employer and insurance carrier are also estopped from raising any question in respect to said notice by reason of the written agreement for the payment of compensation entered into as hereinbefore noted.

Award of compensation is hereby made against Joseph F. Stabell Company, employer, and London Guarantee and Accident Company, Ltd., insurance carrier, to George B. Kulp, injured employee, in the sum of \$2,000 on account of and in view of the serious facial disfigurement resulting from the injuries sustained on December 30, 1917.

It is presumed under section 21 of the Compensation Law that sufficient notice of injury was given to the employer. Both employer and insurance carrier are estopped from raising any question in respect to the failure, if any, to give written notice of injury within ten days after disability by reason of the written agreement for the payment of compensation entered into between employer and injured employee.

In the Matter of the Claim of FRANCES GATTOVI, Widow, for Compensation under the Workmen's Compensation Law, for the Death of ANTHONY B. GATTOVI, against THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer

Death Claim No. 66463

(Decided September 6, 1918)

Injuries sustained by Anthony B. Gattovi, resulting in his death, while employed as a switch brakeman by the New York Central Railroad Company at Albion, N. Y.

On January 9, 1915, Anthony B. Gattovi, while employed as a switch brakeman by the New York Central Railroad Company at Albion, N. Y., and while engaged in the regular course of his employment, jumped from his engine for the purpose of throwing a switch and was struck by a passing engine and instantly killed. The car he was switching at the time of his death was a coal car originating at Coxton, Penn., consigned to a coal dealer at Albion, N. Y., having been dropped at Albion the night of the accident by a train of which it formed a part on its interstate journey from Coxton to Albion. Held, that the general scope of deceased's employment embraced the moving of cars in both interstate and intrastate commerce and that as the interstate transportation of said coal car was not terminated until the car was placed on the elevator siding used by the consignee the deceased was employed in interstate commerce at the time of said accident. Award denied on the ground that the deceased was employed in interstate commerce and therefore the Commission is without jurisdiction.

This claim came on for hearing before State Industrial Commission at Albany, N. Y., on November 3, 1915; at New York city on June 14, 1917; at Albion, N. Y., on May 27, 1918, and at New York city on September 6, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Fluhrer, Reed, Wage & White, attorneys for claimant.

Visscher, Whalen & Austin, attorneys for employer and self-insurer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact and decision as follows:

On January 9, 1915, the day when Anthony B. Gattovi received the injuries which resulted in his death on the same day, he resided at Ilion, N. Y., and was employed by the New York Central Railroad Company engaged in the operation of a steam railroad. Anthony B. Gattovi was employed as a brakeman assigned to a switching crew. The general scope of his employment embraced the moving of cars in both intrastate and interstate commerce.

On January 9, 1915, Anthony B. Gattovi was working for his employer at Albion, N. Y., and while engaged in the regular course of his employment as a brakeman he was riding on the footboard of a switching engine, and after having jumped from said footboard for the purpose of throwing a switch he was struck by a passing engine and sustained injuries, including a broken neck, which resulted in his death instantly.

At the time of this accident Anthony B. Gattovi was employed as a brakeman and a member of a switching crew, which was then engaged in switching a car loaded with coal from the main tracks or yard at Albion, N. Y., to an elevator siding in front of the plant or premises of the consignee of said coal car. The coal car had arrived at Albion at about 9:50 P. M. on January 8, 1915, and had originated at Coxton, Penn., and was consigned to Harold Crother, a coal dealer at Albion, N. Y. The car had been dropped at Albion the night before the accident by the train, of which it formed a part, on its interstate journey from Coxton to Albion.

On the morning of January 9, 1915, Harold Crother, the consignee, had been informed of the arrival of the car of coal. It was customary for the railroad company to deliver all cars billed to said consignee on an elevator siding located in front of the consignee's plant. Said siding was used for the service of some half dozen private concerns, and was not used for transporting trains over generally, though used in case of emergency by the railroad company for the storage of its cars or of its passenger trains.

As the interstate transportation of said coal car was not termi-

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nated until the car was placed on the elevator siding, Anthony B. Gattovi was employed in interstate commerce at the time of said accident.

Anthony B. Gattovi left him surviving Frances Gattovi, widow, aged twenty-three years, the claimant herein.

Award of compensation is hereby denied to Frances Gattovi, widow, on the ground that at the time of said accident Anthony B. Gattovi was employed in interstate commerce, and therefore this Commission is without jurisdiction.

In the Matter of the Claim of LILLIAN E. STEWART, Widow, on Behalf of Herself and Infant Children, for Compensation under the Workmen's Compensation Law, for the Death of WILLIAM M. STEWART, against KNICKERBOCKER ICE COMPANY, Employer and Self-Insurer

Death Case No. 350055

(Decided September 18, 1918)

Injuries sustained by William M. Stewart, resulting in his death, while employed as a barge man by the Knickerbocker Ice Company in the city of New York.

On August 3, 1918, William M. Stewart, while employed as a barge man by the Knickerbocker Ice Company, a New Jersey corporation engaged in the business of ice storage and distribution and also in the operation of barges on the Hudson river used in transporting ice from its ice houses on the upper Hudson to points in New York city, and while engaged in the regular course of his employment was standing on a pier aiding in dismantling a derrick and rigging used on ice barges when he fell backward into the river and was drowned. At the hearing the employer and self-insurer raised the question of the constitutionality of the amendment by Congress of sections 24 and 256 of the Judicial Code. Awards made, and funeral expenses provided for.

This claim came on for hearing before the State Industrial Commission at its office, No. 230 Fifth avenue, New York city, on September 18, 1918, and an award of compensation was made as hereinafter set forth. At said hearing the attorney for the employer and self-insurer raised the question of the constitution-

ality of the amendment by Congress of sections 24 and 256 of the Judicial Code contending that said amendment was in violation of the Constitution of the United States, and made in excess of the powers of Congress under the powers of the Constitution.

Robert W. Bonyng, counsel to State Industrial Commission.

Bertrand L. Pettigrew, attorney for claimant.

Frank R. Savidge (Cleland R. Neal, of counsel), attorney for employer and self-insurer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact and award as follows:

On August 3, 1918, the day when William M. Stewart received the injuries which resulted in his death, he resided at No. 1829 Amsterdam avenue, New York city, and was employed by Knickerbocker Ice Company, a New Jersey corporation, engaged in the business of ice storage and ice distribution, as well as in the operation of barges on the Hudson river for the purpose of distributing ice from ice houses on the upper Hudson within the State of New York to points in New York city. William M. Stewart was employed as a barge man on one of said barges.

On August 3, 1918, William M. Stewart was working for his employer and while engaged in the regular course of his employment as a barge man, and while standing on a dock or pier at the corner of Ninety-fifth street and North river, New York city, participating in the dismantling of a derrick and rigging which had been used to remove ice from the barges, he lost his balance and fell backward into the river and was drowned.

The average weekly wage of William M. Stewart was the sum of twenty-three dollars and eight cents.

Due notice of death was given to the employer.

William M. Stewart left him surviving Lillian E. Stewart, widow, aged forty years; Beatrix Stewart, daughter, aged four-

teen years; Alida Stewart, daughter, aged thirteen years; William M. Stewart, son, aged ten years; Lenore Stewart, daughter, aged nine years, and Lillian Stewart, daughter, aged six years, the claimants herein.

Award of compensation is hereby made against Knickerbocker Ice Company, employer and self-insurer, to the widow and minor children of William M. Stewart, deceased employee, as follows: To Lillian E. Stewart, widow, aged forty years, at the rate of six dollars and ninety-three cents weekly during widowhood, with two years' compensation in one sum upon remarriage; to Beatrix Stewart, daughter, aged fourteen years; to Alida Stewart, daughter, aged thirteen years; to William M. Stewart, son, aged ten years; to Lenore Stewart, daughter, aged nine years, and to Lillian Stewart, aged six years, at the rate of one dollar and sixty-nine cents to each until they shall respectively arrive at the age of eighteen years; and in case of the subsequent death of Lillian E. Stewart, widow, then the payments to the children shall be proportionately increased until each child shall be receiving a sum equal to 15 per cent of the above mentioned average weekly wage, but in no event shall the total amount payable exceed $66\frac{2}{3}$ per cent of such wages; and if the payment to the widow shall otherwise cease, or if the payments to any child cease by operation of law or otherwise, then the payments to each of the remaining children shall be increased to 10 per cent of the said average weekly wage; and to Lillian E. Stewart in the sum of ninety-five dollars and fifty cents on account of the funeral expenses of William M. Stewart, deceased.

In the Matter of the Claim of ANNIE KEENAN, Widow, for Compensation under the Workmen's Compensation Law, for the Death of JOHN KEENAN, against H. D. ROOSEN COMPANY, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, Insurance Carrier

Death Case No. 56707

(Decided September 20, 1918)

Injuries sustained by John Keenan, resulting in his death, while employed as a laborer in the color department of the plant of H. D. Roosen Company at New York city.

On October 17, 1917, John Keenan, while employed as a laborer in the color department of the plant of H. D. Roosen Company, a corporation engaged in manufacturing printing ink and colors, and while engaged in the regular course of his employment, was on a balcony constructed to enable workmen on the various tanks to work at the top of the tanks, which stood thirty feet high. While so engaged he was about twenty-five feet from a tank containing "bronze blue" which emitted acid fumes in such volume that the inhaling of them caused the death of deceased. Award made and funeral expenses provided for.

This claim came on for hearing before State Industrial Commission at its office, No. 230 Fifth avenue, New York city, on May 13, 1918, May 27, 1918, July 3, 1918, July 8, 1918, and September 20, 1918.

Robert W. Bonyngé, counsel to State Industrial Commission.

William Butler, attorney for employer and insurance carrier.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision as follows:

On October 17, 1917, the day when John Keenan received

the injuries which resulted in his death, he resided at No. 279 Twentieth street, Brooklyn, New York city, and was employed by H. D. Roosen Company of 461 Eighth avenue, New York city, engaged in the manufacture of printing ink and colors, with a plant or place of business located at No. 78 Twentieth street, Brooklyn, New York city. John Keenan was employed as a laborer in the color department.

On October 17, 1917, John Keenan was working for his employer at his employer's plant and while engaged in the regular course of his employment he inhaled irritating and noxious gases, which aggravated a pneumonia, which on that date had existed, either in a dormant state or already developed, and caused his death on October 19, 1917.

The fumes inhaled by John Keenan arose from the manufacture of approximately 300 gallons of "bronze blue." The mixture was in a tank thirty feet high, which tank was one of a series of ten tanks in the color department of said plant. At the tops of the tanks there was a balcony constructed to enable the workmen to work at that height. John Keenan was working on said balcony at a distance of about twenty-five feet from the tank containing the "bronze blue," and while acid fumes were being discharged from said tank.

The average weekly wage of John Keenan was the sum of thirteen dollars and forty-six cents.

John Keenan left him surviving Annie Keenan, widow, aged fifty-four years, the claimant herein.

It does not appear whether written notice of death was given to the employer within thirty days thereafter, but neither the employer nor insurance carrier was prejudiced by such failure. On the other hand, it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given.

Award of compensation is hereby made against H. D. Roosen Company, employer, and London Guarantee and Accident Company, insurance carrier, to Annie Keenan, widow of John Keenan, deceased, aged fifty-four years, at the rate of \$4.038

weekly, during widowhood, with two years' compensation in one sum upon remarriage; and to Edward H. Lockwood in the sum of \$100 on account of the funeral expenses of John Keenan, deceased.

It is presumed under section 21 of the Compensation Law that sufficient notice of death was given to the employer. On the other hand, the failure, if any, to give written notice of death to the employer within thirty days thereafter is hereby excused on the ground that neither employer nor insurance carrier was prejudiced by such failure, if any.

In the Matter of the Claim of ROBERT BARTH, for Compensation under the Workmen's Compensation Law, against J. E. BUTTERWORTH, Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Insurance Carrier

Case No. 42418

(Decided September 25, 1918)

Injuries sustained by Robert Barth while employed in a garage by J. E. Butterworth.

On or about November 14, 1917, Robert Barth, while employed in a garage by J. E. Butterworth in fitting and hanging a large door, was in the regular course of his employment when the door got beyond his control and the weight of it came upon him, causing a strain resulting in blindness in the left eye. The door weighed between 300 and 400 pounds. Before the accident the claimant had no defect of vision but a few days afterward the vision was entirely gone. *Held*, that the undisputed evidence in the case compelled the belief that the claimant's blindness in his left eye has been traced with reasonable certainty to the accident. Award made.

The claimant asks compensation for the loss of the sight of his left eye growing out of an accident which occurred, as he says, on or about the 14th day of November, 1917. In his claim for compensation, in answer to the question, "Describe how the accident occurred," the claimant says, "I was in the act of lifting

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a three hundred pound door when the excessive weight caused a strain to my left eye resulting in loss of vision in that eye, and partial loss in the right eye."

The claim is resisted by the insurance carrier, on the ground that the loss of vision was not due to an accident, a Wasserman test giving reaction of four plus, and on the further ground that no proper notice was given to the employer of the accident, in pursuance of section 18 of the Compensation Law, and that the insurance carrier was prejudiced by failure to give such notice.

A. R. Baier, for claimant.

J. F. Connor, for insurance carrier.

LYON, Commissioner.—The claimant says that he was in the act of fitting and hanging a large door to the employer's garage when the door got beyond his control and the whole weight of it came upon him, causing a strain which resulted in his blindness. He says the door was about two inches thick and four and one-half feet by ten. My first impression was that a door of this size could not cause a strain upon a workman sufficient to destroy the sight of an eye, but the undisputed evidence in the case is that the door weighed some 300 or 400 pounds, that the claimant had had no trouble with his eyes before the accident, that he had never made any complaint about impaired vision, but that immediately after the accident he made very serious complaint and within a few days the vision was entirely gone.

William Entistle, a fellow employee, who was assisting the claimant when he was injured, testified as follows: "Q. Tell us what you know about this accident? A. This man had the door to lift and he asked me to help him down with it; when he got it loosened it slipped and it seems he got the greater part of the weight, and when we let it down he sat down and he complained about his eye. * * * Q. What did that door weigh about? A. At least 300 or 350 pounds, I should judge. Q. What conversation, if any, did Mr. Barth have with you at that time in regard to his eyes or anything about the condition of his eyes?"

A. He was complaining right along for a couple of days after.
Q. Before that date? A. No, not before, but after that; I never heard him before. Q. What did he say when he complained?
A. He says he must have strained the eye or something to that effect."

The employer was called to the stand and testified that Mr. Barth also told him very shortly after the accident that he had strained his eye. The first doctor who attended the claimant was Dr. Crigler, who examined the claimant on November twenty-sixth. This doctor states in his report that he found no evidence of injury although he states that he found a few degenerative spots near the optic nerve head. He also expresses doubt as to whether the claimant is totally blind in this eye. The specialist for the insurance carrier, however, admits that the sight of the eye is gone, and also states that he found on examination evidence of a hemorrhage. It is quite probable that the diseased condition of the claimant, indicated by the Wasserman test, rendered him much more liable to blindness than an ordinary healthy man would be, but with the evidence that a heavy door came upon him causing a strain resulting in an immediate disability, I do not see how the Commission, under its former rulings and the rulings of the appellate court, can escape a decision that a previously diseased condition was at least accelerated and hastened to a serious conclusion by the accident.

The case of Borgsted v. Schultz Bread Company is relied upon by the insurance carrier, but I think the present case is clearly distinguishable from that. In the Borgsted case the loss of vision was not immediate, but gradual, and was traced by the Commission to an impairment of vitality, owing to the breaking of the tibia of the claimant's leg. In the present case, however, we have the falling of a door of great weight followed by an immediate complaint of loss of vision and later by a complete loss of vision in a man, who, previous to the date of the accident, had vision which was for practical purposes normal, so far as the evidence discloses.

I think the claimant's blindness in his left eye has been traced

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with reasonable certainty to the accident of which he complains. I reach this conclusion only after careful study of the case and in reversal of my first impressions of the case, which were altogether against the claim. I think also it must be found that the employer and insurance carrier were not prejudiced by the failure of the claimant to give the written notice called for by section 18 of the Compensation Law. The claimant insists that he gave verbal notice to his employer within two or three days after the accident, and the employer when called to the stand could not deny this, but admitted that very shortly after the accident the claimant informed him of the accident and its consequences. There is no claim made on the part of the insurance carrier that anything could have been done to save the eye if written notice had been given within the time called for by the statute. I therefore recommend that an award for loss of the eye be made.

On the 25th day of September, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of RAFFAELE TARDI, for Compensation under the Workmen's Compensation Law, against ATLANTIC COAST SHIPPING COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. 77705

(Decided October 3, 1918)

Injuries sustained by Raffaele Tardi while employed as a longshoreman by the Atlantic Coast Shipping Company of New York city at Norfolk, Va.

On June 21, 1918, Raffaele Tardi, while employed as a longshoreman by the Atlantic Coast Shipping Company of New York city, was loading train wheels on a ship at Norfolk, Va., when one of the wheels struck a knee-joint, inflicting injuries which disabled him from the date of the accident to September 6, 1918, on which date he was still disabled. Award made.

This claim came on for hearing before State Industrial Commission at its office, 230 Fifth avenue, New York city, on September 4, 1918, September 30, 1918, and October 3, 1918.

Robert W. Bonyngne, counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision as follows:

On June 21, 1918, the day when Raffaele Tardi received his injuries, he resided at No. 63 Chrystie street, New York city, and was employed by Atlantic Coast Shipping Company with an office address at 27 William street, New York city, engaged in the business of longshore work, including the loading or unloading of cargoes or parts of cargoes of freight and general merchandise or moving or handling the same on docks and piers. Raffaele Tardi was employed as a longshoreman.

On June 21, 1918, Raffaele Tardi was working for his employer at Norfolk, Va., and while engaged in the regular course of his employment as a longshoreman, while loading train wheels on a ship, but while at work on a dock or pier, one of said wheels struck his right knee, injuring the same, which injuries resulted in a moderate enlargement of the right knee, and in a pre-patella bursitis and in a limitation in flexion at the knee joint, which injuries disabled him from the date of said accident to September 6, 1918, and on that date he was still disabled.

The contract of employment was entered into in the State of New York.

The average weekly wage of Raffaele Tardi was the sum of thirty dollars and twenty-nine cents.

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Raffaele Tardi, at the time of said accident, was engaged in longshore work, as defined by group 10 of section 2 of the Compensation Law, as re-enacted by chapter 249 of the Laws of 1918.

It does not appear whether written notice of injury was given to the employer within thirty days after the accident causing such injury, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given. On the other hand, objection to the failure to give such notice not having been raised before this Commission at the hearings of this claim is deemed to have been waived by both the employer and the insurance carrier.

Award of compensation is hereby made against Atlantic Coast Shipping Company, employer, and Travelers' Insurance Company, insurance carrier, to Raffaele Tardi, injured employee, for eleven weeks at the rate of fifteen dollars per week, covering period from June 21, 1918, to September 6, 1918, and this claim is hereby continued for further hearing.

It is presumed under section 21 of the Compensation Law that sufficient notice of injury was given to the employer. On the other hand, the failure to give such notice is deemed to have been waived by both the employer and the insurance carrier.

In the Matter of the Claim of SOFIA BREWINSKI, Widow, for Compensation under the Workmen's Compensation Law, for the Death of TONY BREWINSKI, against THE PULLMAN COMPANY, Employer

Death File No. 888

(Decided October 15, 1918)

Injuries sustained by Tony Brewinski, resulting in his death, while employed as a car cleaner by the Pullman Company at Mott Haven, N. Y.

On March 31, 1916, Tony Brewinski, while employed as a car cleaner working for the Pullman Company in yards of the New York Central and Hudson River railroad, was killed by being struck by an engine of

the railroad company on its tracks at or near Mott Haven. The insurance carrier contends that the claim is barred upon the technical ground of not having been filed within one year after the accident, and also on the ground that proof is lacking as to the accident resulting in the deceased's death arising out of and in the course of his employment. The technical claim held to be ill-founded, upon the ground that the notice is covered by the reservation to herself and dependents of all further rights and remedies in the notice filed with the Commission by the widow of her election to sue a third party. On the merits of the case, however, *held*, that the deceased was regularly employed as a car cleaner at the yards of the New York Central railroad to clean the cars of the Pullman Company. He had there a convenient staircase for use without crossing any tracks at all to reach the highway by which he could reach a bridge over which he could cross the tangle of tracks and reach the street on which he would ordinarily go home. On the day of the accident, however, after passing over this bridge he walked up another highway and then down again to the tracks of the railroad to procure a discarded railroad tie to take home when he was struck by the engine. *Held*, also, that at the time of the accident he was on his own service and was not performing any service for his employer but technically was a trespasser upon the tracks. Award denied.

This is an application for death benefits by the widow of Tony Brewinski growing out of his death on the 31st day of March, 1916. The deceased was a car cleaner working for the Pullman Company in yards of the New York Central and Hudson River railroad and was killed at about 6:15 or 6:30 o'clock P. M. by being struck by an engine of the railroad company on its tracks at or near Mott Haven.

The claim is resisted by the insurance carrier, on the ground that it is barred by the Statute of Limitations because not filed within one year after the accident, and on the further ground that there is no proof that the accident resulting in the deceased's death arose out of and in the course of the employment.

A. Rosenstein, for claimant.

R. H. Bacon, for insurance carrier.

LYON, Commissioner.—It is quite true that the technical claim for compensation upon the Commission's blank was not filed with

the Commission until June 23, 1917, but on May 1, 1916, the claimant filed with the Commission a notice of election to sue a third party, which after stating the claim which she intended to prosecute against the third party, proceeded, as follows: "reserving, however, to myself and my dependents all further rights and remedies, if any, remaining to me or to them under the provisions of such Act."

This, I think, is a sufficient claim for compensation under the circumstances, because if the widow had filed the usual form of claim prepared by the Commission instead of relying upon this as a sufficient claim, it would have carried by reason of the statute an assignment of her claim against the third party to the insurance carrier. The Commission has already held that this form of reservation in the notice of election to sue is a sufficient claim for compensation to prevent the running of the statute. When it comes, however, to the merits of the case, I think the widow is not so fortunate. It seems that the deceased was regularly employed as car cleaner in the Mott Haven yards of the Central railroad to clean the cars of the Pullman Company. At the place where it was customary for him to work there are a very great number of tracks, and the evidence is that from the place where he worked he had a very easy way by the use of a stairway, without crossing any tracks at all, to reach a highway known as Sheridan avenue, by going down which he could reach a bridge or viaduct by which he could cross the tangle of tracks and reach the street on which he would ordinarily go home. On the day of his accident, he seems to have left his employment by this route, passed over the bridge and then walked up another highway for a considerable distance and then again gone down upon the tracks of the Central railroad and procured an old discarded railroad tie which he was carrying home, apparently for the purpose of making fire wood. The engineer of the train which struck him testified that when he first saw him he was carrying this tie in front of his engine on one of the tracks and that he struck the deceased with his engine before he could bring his engine to a standstill. From the effects of this accident the deceased died almost instantly. It, therefore, appears

that the deceased had entirely completed his day's work and had reached a public highway and gone considerable distance toward his home and then for reasons of his own entered upon the tracks of the railroad and was killed while performing no service for his employer and while in the act of carrying away discarded wood for his own purposes. In fact he was technically a trespasser upon the tracks of the New York Central Railroad Company.

I think it must be found that the accident which happened to him did not arise out of and in the course of his employment and that the claim for compensation must be denied.

On the 15th day of October, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

All concur.

In the Matter of the Claim of FRANK CARNEY, for Compensation under the Workmen's Compensation Law, against LEHIGH VALLEY RAILROAD COMPANY, Employer

Claim No. 4409

(Decided October 15, 1918)

Appeal considered from an award heretofore made in this case upon review of the evidence.

In this case an award was made and an appeal taken, and it is this appeal which now comes before the Commission for review of the evidence to determine whether the award should be sustained. *Held*, that there is no question of the claimant being injured through an industrial accident and if entitled to anything that it is for the loss of one toe and probably two. Compensation is resisted on the ground that the claimant was injured in interstate commerce and also on a technical objection of want of notice of injury. The technical objection is overruled. There is no evidence in the case that the accident arose out of interstate commerce. While claimant probably handled interstate freight, there is a failure of proof to show that he was handling such freight at the time of the injury or that the car on which he was at work on that trip was carrying interstate freight. Appeal disallowed and original award sustained.

An award was made in this case from which an appeal has been taken and the same came on before the Commission upon review of the evidence to see whether the award could be sustained. The matter was referred to Commissioner Sayer and has been by him sent to my desk owing to the fact that his engagements in the Federal service are such as to make it impossible for him to give the case proper consideration.

There is no question but that the claimant was injured through an industrial accident and is entitled, if the case is compensatable, to payment for the loss of one toe and probably two. The insurance carrier resists the payment of compensation on two grounds: *first*, on the ground that the claimant was injured in interstate commerce, and *second*, that no notice of the injury was given within the statutory time, in pursuance of section 18 of the Compensation Law.

Claimant in person.

W. F. Gleason, for the employer.

LYON, Commissioner.—The testimony in the case is very meagre, but from a study of all the papers in the folder, it looks as though one or both of the defenses set up by the insurance carrier might have been sustained if proper testimony had been offered; however, as there is positive proof of an industrial accident to the injured employee, I think the presumptions raised by section 21 of the Compensation Law apply. There isn't a syllable of testimony in the case, so far as I have been able to see, sustaining the contention of the employer that proper notice was not given within the statutory time. It is true that the representative of the employer stated before the Commission that notice was not given, but his statement is not backed up by any offer of testimony. I take it that the burden of proof to show that notice was not given is, in the first instance, upon the insurance carrier, on the theory that it is a defense to the claimant's claim, and that proof of a notice required by the statute is not a condition precedent to the claimant's recovery. This, I think, is quite evident from the

first subdivision in section 21, which provides: "That the claim comes within the provisions of this chapter." This is sustained, I think by the reasoning in the case of *Dorb v. Stearns*, where the court said, "it is the written notice of section 18 which is protected by the presumption of section 21. The presumption disappears simultaneously with the establishment of the fact that the claimant has not complied with section 18. Then the burden properly falls on him to establish affirmatively that his failure has not been prejudicial."

I think the employer is in a similar position with reference to its claim that the accident arose out of interstate commerce. There is no evidence in the case that such was the fact, with the exception of one short affidavit made by J. T. Buckley, which is as follows: "I am employed by the Lehigh Valley Railroad Company as Agent at Manchester, N. Y. Transfer House. On or about the 20th day of October, 1916, I had working under me one Frank Carney who was employed as a stower of freight at the transfer freight house at Manchester, N. Y. This man's duties while employed at Manchester consisted of stowing freight in cars which freight was going to and had come from points outside the state of New York."

I do not think that this is sufficient proof that the freight which Carney was stowing at the time he was hurt, was destined to go outside the State of New York. It cannot be taken to mean that no freight whatever was handled at Manchester, N. Y., except that going out of the State, for it must be remembered that the employer here is a common carrier and is compelled by law to accept freight for intrastate as well as for interstate transfer, and while it is probable that Mr. Carney frequently handled interstate freight, there isn't a syllable of evidence, so far as I can see, that he was handling interstate freight at the time he was injured, or, that the car in which he was stowing freight was carrying, *on that trip*, interstate freight. In my opinion the application to set aside the award must be denied for failure of proof both that the accident happened while the employee was engaged in interstate com-

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merce and that notice of the accident was not given in due time, in pursuance of section 18.

Since writing the above I find a memorandum in the folder in which Commissioner Sayer reached the same conclusion, but for some reason the case was again put on the calendar after Commissioner Sayer's memorandum.

On the 15th day of October, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

All concur.

In the Matter of the Claim of FELIX BRASTOWICZ, for Compensation under the Workmen's Compensation Law, against DOEHLER DIE CASTING COMPANY, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Case No. 518

(Decided October 16, 1918)

Supplying improper treatment is of itself a refusal of treatment within the meaning of the law.

The application herein is in relation to an award for a doctor's bill. An award in favor of the injured claimant has been made for injuries sustained by him as the result of the explosion of molten lead. The present application is in behalf of a physician engaged by the injured man after the physician furnished by the employer had failed to properly care for the patient. *Held*, that the failure technically of the injured man to request medical treatment cannot be urged by the employer as the latter sent a physician to the claimant, which presupposes requested medical treatment. The treatment supplied by the employer having been inadequate is of itself a refusal of treatment within the meaning of the law. Award covering doctor's bill confirmed.

This is an application for an award for a doctor's bill. An award has been made, an appeal taken and our counsel, to whom it was referred to prepare findings, finds some difficulty in doing so, partly because the evidence does not show a request made by

the claimant upon his employer for medical treatment. The claimant was badly burned all over his body by an explosion of molten lead. Some of the burns, at least, were of the third degree and for a time claimant suffered severe pain. He was at first attended by a physician furnished by his employer, but believing that he was being neglected by this doctor, he sent for his family physician, whose bill is now in controversy.

Abraham Lehman, for claimant.

James Johnston, for insurance carrier.

LYON, Commissioner.— Claimant states that at least twenty-four hours and perhaps thirty-six hours elapsed after his first treatment before the physician furnished by the employer visited him, although claimant was suffering great pain. The doctor denies this, but admits that the time between visits was very considerable.

I think in the case of a man injured as badly and suffering as much as the claimant was in this case, a careful physician should consider the psychology of the case as well as its purely medical or surgical aspect. It would seem that the claimant, under the circumstances, had the right at first, at least, to have had frequent visits from the doctor even though from a medical standpoint they were not necessary. The recovery of a badly injured man might be seriously impeded by his belief, while in pain, that he was being neglected. Under the circumstances, I think he was justified in calling in his own physician. I have not overlooked the testimony of the second doctor that in his opinion the claimant had been neglected, and in fact brutally treated by the first physician. I take this testimony with a grain of salt because the witness is greatly interested in having the award made. I prefer to base my opinion on the proposition that though from a purely medical standpoint the treatment may have been proper, still it was not adequate because the doctor's visits were not frequent enough. The case called for the stimulus to the patient's mind which frequent visits would supply.

But it is said that he cannot cast the payment of the bill upon the employer, because he did not request treatment before his own doctor was called in, and reference is made to the case of Goldflam v. Kazaminer & Uhl. It is true that the court in that case said: "It is only where the employer fails to provide a physician after request by the employee that the latter may employ a physician at the expense of the employer."

From the fact that the employer sent a physician to claimant in the first instance, we may assume that claimant, in the first instance requested medical treatment, and he did not get adequate treatment. Is not inadequate treatment or insufficient treatment supplied by an employer tantamount to a refusal of treatment? Surely an employee need not request treatment which has already been shown to be inadequate. The employer by offering inadequate treatment, I think, waived a further request from the employee for medical treatment. What use would a request for medical treatment be? The obvious answer of the employer would be, why?—I have supplied medical treatment, when in fact not being adequate treatment, it was in the eyes of the law no treatment at all. Must a badly injured employee stop to argue the question out with his employer while he is suffering under either no treatment or inadequate treatment? I think not. Supplying improper treatment is *of itself* a refusal of treatment within the meaning of the law. The award to cover the doctor's bill should be confirmed.

On the 16th day of October, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

Wiard, Lynch and Sayer, Commissioners, concur.

In the Matter of the Claim of MARGARET McCALL, Widow, for Compensation under the Workmen's Compensation Law, for the Death of JAMES McCALL, against MEYER HECHT, Employer; UNITED STATES FIDELITY AND GUARANTEE COMPANY, Insurance Carrier

Case No. 100804

(Decided October 16, 1918)

Question as to whether an award having been once made by the Commission can be reversed other than by an appeal to the Appellate Division.

The original claim herein was made by Margaret McCall, widow of James McCall, for injuries growing out of his death from anthrax on April 10, 1918. The employer deals in rawhides and on the original claim an award was made by a deputy commissioner on the ground that the claim was within group 32 of section 2 of the Compensation Law, and that the employer was a furrier. Notice of appeal therefrom was filed by the insurance carrier and the same deputy reheard the case and reconsidered his decision that a dealer in rawhides is a furrier, and held that such dealer was not a furrier and that the claim did not come within the law and therefore reversed his former finding and rescinded the award. The claimant's attorney asked for a rehearing and the matter came on before the Commission, but the claimant's attorney rested his entire contention on the point that the award having been made by the Commission became *res adjudicata* and could only be reversed by an appeal to the Appellate Division. The matter now before the Commission is therefore based merely upon the question of law involved. *Held*, that the claim that the Commission is without power to change the award because there has been no change in conditions must be overruled but with the right to the claimant under the stipulation already made to have the case put on the calendar of this Commission again for a rehearing upon the merits. The decision already made rescinding the award and dismissing the claim should be affirmed.

Claim is made by the widow of James McCall for death benefits for herself and minor children growing out of his death from anthrax on April 10, 1918. The employer is a dealer in raw hides. An award was made by our deputy in the first instance, holding that the claim comes within group 32 of section 2 of the

Compensation Law, on the ground that the employer was a furrier. The insurance carrier thereupon filed notice of appeal and thereafter the deputy who heard the case had the matter put on before him for a rehearing and reconsidered his decision that a dealer in raw hides is a furrier and decided that the employer was not a furrier, and therefore that the claim did not come within the provisions of the Workmen's Compensation Law and reversed his former finding and rescinded the award. Application was thereafter made by the attorney for the claimant for a rehearing and the matter has been heard at length, although no further testimony was taken. The attorneys for both claimant and insurance carrier have been heard orally and the claimant's attorney has filed a brief. On the rehearing before the Commission the attorney for the claimant refrained from going into the merits of the case at all, but rested his entire contention upon the point that the award having once been made by the Commission became *res adjudicata* and could only be reversed by an appeal to the Appellate Division. The Commission decided at the hearing that it would take the matter up upon this question alone and that, if the decision on the legal point were against the claimant, she might still have the matter put on before the Commission for a rehearing on the merits. The attorney for the claimant has, in his brief, limited himself now solely to the legal proposition and the matter has been referred to me for an opinion.

John C. Hollembeak, for claimant.

William P. Burchell, for insurance carrier.

LYON, Commissioner.—The attorney for the claimant relies upon section 23 of the Compensation Law, which is in part as follows: "An award or decision of the Commission shall be final and conclusive upon all questions within its jurisdiction as against the State Fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided."

He admits, however, that in pursuance of section 22, the Commission may change its award where there is shown to be a change

in conditions and he asserts that there can be no such change in an award after it has been made, unless proof is presented that the conditions upon which the award was made have changed and he quite rightly asserts that there is no such change in conditions in the present instance. If these were the only provisions in the law relative to the making of awards and review by appeal, the matter would hardly permit of argument, but section 74 of the Compensation Law gives the Commission continuing jurisdiction and the right "to make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just." The attorney for the claimant also quite rightly states that the Commission occupies a judicial position and from this statement he deduces an argument that the Commission is bound to follow the rules and procedure of courts, and in particular, is bound to follow the rules and decisions relative to appeals, and that its jurisdiction is limited, notwithstanding section 74, precisely as a court's jurisdiction would be and that it cannot disturb an award once made unless it be under section 22 on proof of a change in conditions.

If the attorney is right in his claim that the Commission is bound by all rules of the courts, and particularly by the Code of Civil Procedure, the necessities of the case would seem to demand that the Commission should be made up of practicing attorneys, instead of which there is only one lawyer on the Commission of five. As a matter of fact our conception of the Compensation Law is that while the Commission has judicial functions and has to pass upon conflicting claims very much as a court of law does, still it is not so much a matter of contest between employer and employee as it is one of adjustment on the basis of the inherent justice and equities of the case. Apparently the statute looks quite as much to the business judgment of laymen as to the acumen of those learned in law and in the practice of the courts. On this theory of the Compensation Law, claimants have been discouraged by the Commission from employing attorneys. They are continually told, and we think rightly, that they do not need expert legal advice, but that a full, fair and frank statement of the facts

of the case will result in their receiving proper protection at the hands of the Commission. If the claim now made by the claimant is to prevail, all this, it would seem, must be changed and claimants must employ attorneys who are familiar with the Code of Civil Procedure and with the rules of courts, in order that they may not have their cases passed upon without proper legal protection. This apparently would mean that a very considerable proportion of every award which ought to go to the injured workman must be given to his attorney and the whole intent of the Compensation Law, as the Commission has understood it, would be very largely nullified, and the old abuses which flourished under the liability law would return. Insurance carriers are able to, and in fact do, have representatives present at our hearings who are familiar with legal principles and rules and nothing it seems would be more detrimental to the generality of injured workmen than to have the claim of the claimant here held to be valid.

The Commission's position that it should not be altogether bound by rules which apply in courts of justice seems to be in part, at least, sustained by the express provision in the statute, that the Commission is not to be held down to technical legal rules of evidence, also by the provision of section 74 that the Commission has continuing jurisdiction and may vary its award as justice demands. It should further be said that the situation confronting the Commission, growing out of the enormous number of awards which have to be made, makes necessary the procedure which the Commission has adopted. It is stated that claims before the Commission amount to not less than 60,000 per year and many of these cases have to be heard many times. In order to handle this enormous amount of business, the Commission is compelled to have calendars heard in different parts of the State by its deputies who take the testimony and make the award, subject to confirmation by the Commission. These deputies for the most part are laymen and not learned in the law and it could hardly be that in this enormous number of cases the deputies and perhaps the Commission itself, would make awards which after more careful examination would be found not to stand the test of the Compensa-

tion Law. The law has been so amended that the conclusions of fact and rulings of law are not to be prepared by the Commission until after notice of appeal from the award, thus obviating the necessity for making findings in the vast number of cases where no appeals are taken. It thus happens that in many cases careful examination of the testimony by the Commission itself is only made after the matter has been sent to counsel for the purpose of having the findings prepared. The counsel then goes over the case carefully and if it finds that the award cannot be sustained or that the probabilities of sustaining it are very doubtful, he is instructed to send the matter to the Commission for a rehearing. Such cases of course can come to the Commission only after an appeal has been taken by one party or the other as was the case here. Great injustice would often be done if a *manifestly erroneous* decision on the facts could not be corrected by the Commission because our findings of fact cannot be reviewed by the courts. In fact, such would seem to be the case here.

No doubt an appreciation of the difficulties already enumerated was in the mind of the Legislature when section 74 of the law was inserted, notwithstanding the previous insertions of sections 22 and 23. I think it must be presumed that the Legislature saw that in many cases a proper and final determination could not be made in the first instance, and that, therefore, a discretion was given to the Commission by section 74 to review its own decisions at any time, whether the time to appeal has expired or not. In my opinion, it was because of the legal proposition that the time for a litigant to appeal from a final decision cannot be extended beyond the statutory period, and because the doctrine of *res adjudicata* is firmly fixed in the decisions of courts, that section 74 was put into the law, in order to relieve the situation in those respects. The attorney for the claimant cites the case of Clemens, 180 App. Div. 92, in support of the proposition that the insurance carrier's only remedy is by way of appeal, but that case I think when properly understood is not adverse to the position which the Commission takes with reference to section 74. In that case the Commission in its discretion had refused to open a case at the instance

of an insurance carrier, and I think the decision may be held to be nothing more than an affirmance of the proposition that where a right rests in discretion, it cannot be reviewed on appeal unless there is clear abuse of discretion. In that case an award was made against the employer and the insurance carrier. The insurance carrier claimed that it was not liable because the policy of insurance had been procured from it by fraud, raising a pure question of law. The Commission overruled this contention and made the award against both employer and insurance carrier, from which no appeal was taken by the insurance carrier. Thereafter the Commission brought suit upon the award against both the employer and the insurance carrier, in which the insurance carrier set up the defense that it was not liable because the policy had been procured by fraud. The court overruled that defense and judgment was entered. Thereupon the insurance carrier applied to the Commission for a rehearing under section 74 which the Commission refused and the Appellate Division simply ruled that so long as the Commission in its discretion did not open the case, the only remedy of the insurance carrier was to appeal from the original award. The decision, therefore, is not authority for the proposition that the Commission has no right to open an award under section 74, where there has been no change in conditions, especially where an erroneous finding of fact has been made.

The decision in this case might be based upon the opinion written in *Fisher v. Genesee Construction Company* and reported in our Bulletin, Volume 3, No. 12, at pages 266 and 267, now on appeal to the Appellate Division, but the energy with which the attorney for the claimant has presented his case here and the different angles from which he has approached it, makes it seem proper to re-examine the whole proposition. I am very clearly of the opinion that the claim that the Commission is without power to change the award, because there has been no change in conditions, must be overruled, but with the right to the claimant, under the stipulation made at the last hearing to have the case put on our calendar again for a rehearing upon the merits. Should the attorney for the claimant desire to further test the legal proposition on appeal, I should be in favor of giving the

same right to a rehearing on the merits after a decision of the Appellate Division, if he wishes it. For the present, at least, I advise that the decision already made rescinding the award and dismissing the claim be affirmed.

On the 16th day of October, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

Wiard, Lynch and Sayer, Commissioners, concur.

